

REGULATION OF THE TRADING STAMP INDUSTRY

I

INTRODUCTION

THE TRADING STAMP as a competitive device has had a sixty-year history in American retail merchandising, during which time it has been ardently praised by many consumers¹ and bitterly deplored by most merchants.² Its highly litigious history reached its apogee in the early 1900's when the constitutionality of anti-stamp legislation was debated in the courts of some twenty states.³ The resurgent use of these stamps in recent years, however, has led to new clashes. In 1955, proposals to regulate stamp companies were introduced in twenty-four state legislatures,⁴ and this was followed, in 1956, by independent investigations of the industry by the Federal Trade Commission,⁵ the United States Department of Agriculture,⁶ and the United States Department of Justice.⁷ Because of the complexity of the economic issues involved, and because of the paucity of objective discussion of these issues and their

¹ Surveys from numerous areas indicate that as many as 50% of American families save trading stamps. VREDENBURG, TRADING STAMPS 20 (1956). Other evidence of the popular appeal of trading stamps is the large vote by which a South Dakota anti-stamp statute was defeated in a referendum conducted in the 1956 election. See note 68 *infra*. There is, however, some indication of consumer dissatisfaction. In a poll recently conducted in Miami, Florida, three-fourths of 5,000 newspaper readers polled opposed trading stamps. Miami Herald, March 5, 1957, § B, p. 1.

² The various retail trade journals are invariably replete with retailer denunciations. See e.g., The Grocers Guide, XXVI, No. 11, March 1956, p. 1; Maine State Grocers Bulletin, Vol. 19, No. 3, Feb.-Mar. 1955, p. 4; The Maryland Grocers' Skirmisher, Vol. 30, No. 8, Aug. 1955, p. 7; Washington State Food Dealer, Vol. 51, No. 5, May 1956, p. 3.

³ For a collection of cases involving anti-stamp legislation, see notes 30 and 31 *infra*.

⁴ See note 66 *infra*.

⁵ Letter from Herbert L. Propst, Assistant Manager, Washington Branch Office, Federal Trade Commission to the *Duke Bar Journal*, Oct. 11, 1956, on file in Duke Law Library. See note 110 *infra*.

⁶ U.S. Department of Agriculture, Do Trading Stamps Affect Food Costs?, Marketing Research Report No. 147, Jan. 1957. (Subsequent departmental reports will disclose information on other phases of the trading stamp problem.) See note 56 *infra*.

⁷ The Antitrust Division of the United States Department of Justice is presently conducting its investigation of stamp operations in the grocery field. The purpose and scope of its investigation is not known at present. Interview with counsel for The Sperry & Hutchinson Company, New York City, Jan. 2-4, 1957 (hereinafter cited as INTERVIEW).

legal significance, an extended exploration of the trading-stamp problem and its many ramifications appears appropriate.

The stamp company delivers a "package promotion" to a retailer under an exclusive franchise for the retailer's type of business within his "trade area."⁸ This promotion consists of stamps, savings books, the promise of the company to redeem the stamps with merchandise,⁹ catalogues describing the merchandise which may be obtained with the stamps, plus, perhaps, additional advertising material. The retailer pays the company an amount of money determined by the number of stamps he receives, typically ten dollars per 4,000 stamps, or one-quarter of a cent per stamp,¹⁰ which generally approximates the "cash" value assigned it by the company.¹¹ The retailer then distributes the stamps to consumers upon purchase of goods at the rate required by the company's contract, usually no less than one stamp per ten-cent purchase.¹² When the purchaser has amassed stamps sufficient to fill his savings book, he becomes entitled to select merchandise, called hereafter redemption premiums, either by mail from a catalogue or at a local redemption outlet maintained by the company. These redemption premiums are "priced" in terms of the "cash" value of the stamp, ordinarily at the average price of that commodity in the retail market.¹³

⁸ The exclusive franchise agreement is indispensable to the stamp operation, for a merchant would be reluctant to adopt a stamp plan without the assurance that the company would not sell stamps to his competitors. See VREDENBURG, *op. cit. supra* note 1, at 116. This promise of the company is typically not mentioned in the contract form, but is added by amendment which includes a description or map of the retailer's "trade area." INTERVIEW. The size of the trade area in a given contract depends upon the relative bargaining power of the parties. See note 137 *infra*.

⁹ This promise must, of course, be altered in those states which, by statute, require that trading stamps be redeemable both in cash and in merchandise at the option of the holder. See e.g., 2 REV. CODE OF WASH. § 19.84.020 (1951). Cf. WIS. STAT. § 100.15(1) (1953) (requiring trading stamps to be redeemed in cash only). See proposed legislation requiring redemption in cash, note 88 *infra*.

¹⁰ The price paid for stamps by retailers varies as between stamp companies but generally ranges from two to three-tenths of a cent per stamp. VREDENBURG, *op. cit. supra* note 1, at 47; U. S. Department of Agriculture, Do Trading Stamps Affect Food Costs?, Marketing Research Report No. 147, Jan. 1957, p. 1.

¹¹ The "cash" value which the company assigns to each stamp does not represent its monetary value, except where required by statute. See note 9 *supra*. Rather, it represents the value of the stamp in terms of the average retail price of the items offered for redemption. See, Trading Stamp: Bane or Boon?, Business Week, May 19, 1956, P. 43.

¹² Under the terms of the customary company-retailer contract, the retailer is required to offer stamps to all customers at a specified number per amount of purchase. See e.g., Sperry & Hutchinson Company contract, Form 22 M Rev. Sept. 10, 1956, on file in Duke Law Library (requiring one stamp to be given for each ten-cent purchase).

¹³ See note 11 *supra*.

While this characterization refers specifically to stamp companies, it applies with some modification to a variety of independent stamp plans.¹⁴ However, because stamp companies are economically more significant, they will constitute the primary focus of this paper.

Trading-stamp companies have been in operation since the turn of the century. Their origin, perhaps, is to be found in premiums offered by manufacturers in the 1880's,¹⁵ but the first authenticated adoption of stamps was by Shuster's Department Store, of Milwaukee, in 1891.¹⁶ The oldest stamp company, in the strict sense, however, is the Sperry & Hutchinson Company, which was founded in 1900.¹⁷ Judging from the volume and dispersion of litigation, companies such as these enjoyed considerable prosperity in the period 1900-25. Their modern growth parallels the general business upswing following World War II, since which time their rate of growth has been precipitous,¹⁸ both in over-all number and in individual size. The Sperry & Hutchinson Company, trademark owner of "S & H Green Stamps," by far the largest in a field of some 400 competitors,¹⁹ has grown in assets from \$9,000,000 in 1946 to \$67,000,000 in 1954.²⁰ This company alone distributes stamps to more than 60,000 retailers, operates 450 redemption outlets, and

¹⁴ Stamp promotions similar in operation to the stamp company arrangement are the store-owned companies, cooperative stamp companies, individual store stamp plans, and cash register receipt plans. VREDENBURG, *op. cit. supra* note 1, at 50-61. See also note 123 *infra*.

¹⁵ This first premium plan was actually initiated in 1851 by the B. T. Babbit Company, which attached coupons to its soap products. This practice was then adopted by the Great Atlantic and Pacific Tea Company and its competitors during the 1860's and was later extended to include the distribution of chromos and glassware to customers. VREDENBURG, *op. cit. supra* note 1, at 13; Wall Street Journal, Jan. 31, 1955, p. 1.

¹⁶ Wall Street Journal, Aug. 18, 1953, p. 1.

¹⁷ The Sperry & Hutchinson Company was incorporated by the state of New Jersey in 1900 and is presently licensed to do business in all forty-eight states. INTERVIEW.

¹⁸ From 1948 to 1955, the trading-stamp industry expanded from 150 to an estimated 370 companies. New York Retailer, Nov. 1955, p. 3. Illustrative of the recent growth in volume of stamp company sales is the \$350 million worth of stamps sold in 1956 which marked a 75% increase over 1955 sales. Vredenburg, *Who Pays for Trading Stamps?*, 41 SCIENCE DIGEST 86 (Jan. 1957). Another source estimated that the over-all sales of trading stamps to retailers in 1956 totaled more than \$600 million. U.S. Department of Agriculture, *Do Trading Stamps Affect Food Costs?*, Marketing Research Report No. 147, Jan. 1957, p. 1. Further evidence of the volume of business done by these companies is the estimated \$650-\$805 million retail value of the redemption premiums distributed in 1955. See, VREDENBURG, *op. cit. supra* note 1, at 36.

¹⁹ See U.S. Department of Agriculture Report, note 18 *supra*. An indication of the size of the Sperry & Hutchinson Company is the reported \$400 million worth of stamps it sold in 1956, which constituted $\frac{2}{3}$ of the combined sales of stamp companies for that year. Wall Street Journal, Apr. 3, 1957, p. 1.

²⁰ See, Comment, 24 TENN. L. REV. 557, 559 (1956).

supplies stamps for more than twenty million stamp-saving consumers.²¹

The present size and popularity of the stamp operation have engendered, especially among small retailers, an opposition which has expressed itself in attempts to obtain legislative regulation similar to that demanded when stamps first emerged on the commercial scene, a half century ago. Familiarity with the history of these early legislative efforts, because of its present-day limiting effects, is essential to any understanding of the possible modes of resolution of the modern controversy.

II

THE CONSTITUTIONAL HISTORY OF TRADING STAMPS

Probably the earliest devices employed to frustrate the use of trading stamps²² were the existing "gift enterprise" statutes, which made it unlawful to offer a gift, premium, prize, or award to a purchaser in connection with the sale of merchandise. These statutes, however, were uniformly held inapplicable to trading-stamp operations, in that they did not feature the elements of a "game of chance";²³ and, in consequence, stamp company opponents turned to the state legislatures for assistance. Some states, accordingly, amended their "gift enterprise" statutes to include stamps by definition; others imposed either "prohibitory" license fees under the guise of a general licensing power or, more directly, expressly banned any disbursement of trading stamps;²⁴

²¹ Brief submitted by the Sperry & Hutchinson Company to Hearings conducted by the Consumer Counsel to the Governor of New York, Oct. 2, 1956, p. 5.

²² Not to be considered in this paper are those measures enacted pursuant to the general power of a state or properly empowered municipal corporation to license any business or occupation within the community. See generally, Silverman, Bennett and Lechlitter, *Control by Licensing Over Entry Into the Market*, 8 LAW & CONTEMP. PROB. 234, (1941).

²³ It was early held that since the articles to be given as premiums are generally on display and the redeeming consumer is given his choice of premiums from this display, the scheme is not invalid as a "gift enterprise" or "lottery"—although the stamps are redeemed by a party other than the one from whom the purchaser obtains them, the premium is dependent upon the acquisition of a certain number of stamps, and the article to be chosen is not definitely named. *State v. Shugart*, 138 Ala. 86, 35 So. 28 (1903); *Commonwealth v. Sisson*, 178 Mass. 578, 60 N.E. 385 (1901). Cf. *Long v. State*, 74 Md. 565, 22 Atl. 4 (1891); *State ex rel. Hartigan v. Sperry & Hutchinson Co.*, 94 Neb. 785, 144 N.W. 795 (1913); *Winston v. Beeson*, 135 N.C. 271, 47 S.E. 457 (1904). But see, *Lansburgh v. District of Columbia*, 11 App. D.C. 512 (1897); *District of Columbia v. Kraft*, 35 App. D.C. 253 (1910), cert. denied, 218 U.S. 673 (1910). See generally, Pickett, *Contests and the Lottery Laws*, 45 HARV. L. REV. 1196, 1202-03 (1932).

²⁴ In general, these "prohibitory" license fees and statutes which explicitly prohibited the issuance of stamps were directed against; (1) persons engaged in the business of selling or issuing trading stamps to merchants; and/or (2) merchants issuing stamps in

still others enacted a variety of regulatory measures which were so burdensome as to be prohibitory in effect.²⁵

This body of anti-stamp legislation, however, was, for the most part, discriminatory in application. Since impetus for its passage was supplied mainly by groups of small independent retailers who acknowledged the value of the trading stamp as a promotional device, this legislation expressly exempted the stamp-giving retailer who offered redemption from his general stock in merchandise and the manufacturer who attached to his product stamps or coupons for which he, too, provided a means of redemption.²⁶

In the consequent litigation concerning the constitutionality of this prohibitory legislation, the stamp companies enjoyed a marked success, easily persuading the courts that it was beyond the power of a state legislature to restrain, much less prohibit, the successful operation of a "legitimate business."²⁷ With the exception of *Rast v. Deman & Lewis*,²⁸ decided in 1916, in which the Supreme Court held that the

connection with the sale of goods; and (3) merchants issuing stamps redeemable by a third party only.

²⁵ Illustrative of such regulatory measures are provisions requiring that each trading stamp be valued and redeemed independently of other stamps and have printed thereon the character of the article offered for redemption, [*State ex rel. Simpson v. Sperry & Hutchinson Co.*, 110 Minn. 378, 126 N.W. 120 (1910) (Minnesota statute held invalid as imposing an unnecessary restriction amounting to practical prohibition)], and, the requirement that the cash value of the stamp be printed legibly on its face and that redemption be available in cash or merchandise at the option of the holder, provided the stamps are presented for redemption in a quantity aggregating not less than five cents [(*People ex rel. Madden v. Dycker*, 72 App. Div. 308, 76 N.Y. Supp. 111 (3d Dep't. 1902) (New York statute held invalid on grounds that its application to stamp companies only was an unconstitutional discrimination)]. See also, *People ex rel. Appel v. Zimmerman*, 102 App. Div. 103, 92 N.Y. Supp. 497 (4th Dep't 1905). For examples of contemporary legislative proposals apparently designed to prohibit stamp-company operations through strict regulation, see notes 71-73 *infra*.

²⁶ Typical discriminatory provisions are found in KAN. GEN. STAT. ANN. § 19-2210 (Supp. 1955) which imposes a license fee upon all persons causing trading stamps to be distributed, but which excepts from its provisions those persons issuing stamps "redeemable at their face value, in cash or merchandise from the general stock of [the issuing] merchant at regular retail prices at the option of the holder . . . [and manufacturers or packers who distribute a] coupon, ticket, certificate, card or other device . . . redeemable for any goods, wares, or merchandise, free of charge or at less than the retail price thereof, either by the manufacturer or packer or their agents." See, *State v. Wilson*, 101 Kan. 789, 168 Pac. 679 (1917) (statute held constitutional). Although this statute has been denounced as prohibitive by stamp companies, it appears that they are still operating in the state. In 1955, the Kroger Company paid \$71,000 and the Safeway Company paid \$91,000 in license fees in order to issue trading stamps for the period of one year. Letter from John Anderson, Jr., Attorney General of Kansas, to the *Duke Bar Journal*, Oct. 19, 1956, on file in Duke Law Library.

²⁷ See note 33 *infra*.

²⁸ 240 U.S. 342 (1916), 29 HARV. L. REV. 779, 20 LAW NOTES 161. The rationale of the *Rast* opinion was fully supported by two other Supreme Court decisions also

trading stamp is a proper object of state police power regulation,²⁰ and a limited number of state court decisions,³⁰ the courts, in an overwhelming majority of cases, have invalidated such legislation.³¹ But, curiously,

decided in 1916, *Tanner v. Little*, 240 U.S. 369 (1916) and *Pitney v. Washington*, 240 U.S. 387 (1916).

²⁰ The *Rast* case involved the validity of a Florida statute which imposed, upon any merchant distributing stamps, a state license fee of \$500 plus a license fee of \$250 payable to each county in which such merchant transacted business. In reversing a district court decree enjoining the enforcement of the statute on grounds that it was violative of the fourteenth amendment, the Supreme Court not only dismissed these grounds, but, as well, it expressly dispelled any notion that such a statute violated either the commerce or contracts clauses. Furthermore, Mr. Justice McKenna, speaking for a unanimous court, flatly rejected the argument that the trading stamp is an innocuous advertising device immune to prohibition. "Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold, and the acquisition of the article to be sold constitutes the only inducement to its purchase. . . . The schemes of complainants . . . rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a 'lottery,' may not be called 'gaming'; it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry, a matter of inquiry and judgment that it is finally within the power of the legislature to make . . . and it is not required that we should be sure as to the precise reasons for such judgment, or that we should certainly know them, or be convinced of the wisdom of the legislation." 240 U.S. at 365-66.

It has been suggested that the "improvidence," resulting from the desire of the consumer to obtain the "redemption premium," not only refers to buying in overly excessive quantities, as suggested in the *Rast* case, but that, also, it consists of purchasing without regard to grade, quality or price, and, as such, would appear to provide further justification for anti-stamp legislation. Wolff, *Sales Promotion by Premiums as a Competitive Device*, 40 COLUM. L. REV. 1174, 1180 (1940). See note 57 *infra*.

³⁰ Kansas, Louisiana, and Maryland expressly adopted the rationale of the *Rast* case in sustaining anti-stamp legislation. See, *State v. Crosby Bros. Mercantile Co.*, 103 Kan. 733, 176 Pac. 321 (1918); *State v. Wilson*, 101 Kan. 789, 168 Pac. 679 (1917); *State v. Underwood*, 139 La. 288, 71 So. 513 (1915); *State v. J. M. Seney Co.*, 134 Md. 437, 107 Atl. 189 (1919). See also, *Pitney v. Washington*, 80 Wash. 699, 141 Pac. 883 (1914), *aff'd* 240 U.S. 387 (1916). *Cf.* *District of Columbia v. Kraft*, 35 App. D.C. 253 (1910), *cert. denied*, 218 U.S. 673 (1910); *Lansburgh v. District of Columbia*, 11 App. D.C. 512 (1897); *Sperry & Hutchinson Co. v. State*, 188 Ind. 173, 122 N.E. 584 (1919) (declaring the trading stamp to be a proper object of police power regulation, but invalidating a discriminatory statute on equal protection grounds); *Olsen v. Ross*, 39 N.D. 372, 167 N.W. 385 (1918); *Sperry & Hutchinson Co. v. Weigle*, 169 Wis. 562, 173 N.W. 315 (1919).

³¹ See, e.g., *Humes v. Little Rock*, 138 Fed. 929 (1898); *Ex parte Drexel*, 147 Cal. 763, 82 Pac. 429 (1905); *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916 (1899); *United Cigar Stores v. People*, 68 Colo. 546, 190 Pac. 1117 (1920); *United Cigar Stores v. Stewart*, 144 Ga. 724, 87 S.E. 1034 (1916); *Territory v. M. A. Gunst & Co.*, 18 Hawaii 196 (1907); *Sperry & Hutchinson Co. v. Hoegh*, 246 Iowa 9, 65 N.W.2d 410 (1954); *Lawton v. Stewart Dry Goods Co.*, 197 Ky. 394, 247 S.W. 14 (1923); *State ex rel. Simpson v. Sperry & Hutchinson Co.*, 110 Minn. 378, 126 N.W. 120 (1910); *People ex rel. Attorney General v. Sperry & Hutchinson Co.*, 197 Mich. 532, 164 N.W. 503 (1917); *State ex rel. Hartigan v. Sperry & Hutchinson Co.*, 94 Neb. 785, 144 N.W. 795 (1913); *State v. Lothrop-Farnham*, 84 N.H. 322, 150 Atl.

whether these decisions, considered together, support the broad proposition that the trading-stamp industry is immune to prohibitory legislation is open to question.

First, the validity of the allegedly prohibitory statutes examined in many of these cases was determined with reference to a strict definition of police power, which was then deemed to embrace only public health, safety, and morals.³² Consequently, it was universally declared that the stamp company is a "legitimate enterprise," since it merely provided the retailer with a "cash discount service."³³ Further, the trading stamp was

551 (1930); *State v. Ramseyer*, 73 N.H. 31, 58 Atl. 958 (1904); *State v. Holtgreve*, 58 Utah 563, 200 Pac. 894 (1921). Cf. *Alabama Independent Service Stations Ass'n. v. Hunter*, 249 Ala. 403, 31 So. 2d 571 (1947); *Denver v. United Cigar Stores*, 68 Colo. 363, 189 Pac. 848 (1920); *Hewin v. Atlanta*, 121 Ga. 723, 49 S.E. 765 (1905); *Sperry & Hutchinson Co. v. State*, 188 Ind. 173, 122 N.E. 584 (1919); *Sperry & Hutchinson Co. v. McBride*, 307 Mass. 408, 30 N.E.2d 269 (1940); *Opinion of Justices*, 226 Mass. 613, 115 N.E. 978 (1917); *People v. Victor*, 287 Mich. 506, 283 N.W. 666 (1939); *International Trading-Stamp Co. v. Memphis*, 101 Tenn. 181, 47 S.W. 136 (1898). See also, cases cited notes 23 *supra*. For a collection of cases involving trading stamp legislation, see generally, Comment, 24 TENN. L. REV. 557 (1956); Notes, 41 IOWA L. REV. 265 (1956), 40 YALE L. J. 1112 (1931), 133 A.L.R. 1087 (1941); 124 A.L.R. 341 (1940); 26 A.L.R. 707 (1923).

³² See, e.g., *People ex rel. Appel v. Zimmerman*, 102 App. Div. 103, 92 N.Y. Supp. 497 (4th Dep't 1905); *State v. Dalton*, 22 R.I. 77, 46 Atl. 234 (1900); *State v. Dodge*, 76 Vt. 197, 56 Atl. 983 (1904). In commenting on these early cases and their influence in later decisions against trading stamp legislation, the Supreme Court of Kansas described the former as being "made at a time when the police power of the state was regarded as much more restricted in its scope than accords with present day conceptions, and the later decisions were influenced by those already made. . . . The assumption that police power extends only to the protection of the health, safety and morals of the public, which was at one time quite general, is now out of date. The modern view is that the state may control the conduct of individuals by regulation which upon reasonable grounds can be regarded as adapted to promoting the common welfare, convenience or prosperity." *State v. Wilson*, 101 Kan. 789, 794, 169 Pac. 674, 681 (1917). For a discussion of the propriety of contemporary state legislation restricting trading stamp operations, see the dissenting opinion of Chief Justice Garfield in *Sperry & Hutchinson Co. v. Hoegh*, 246 Iowa 9, 25-38, 65 N.W.2d 410, 419-26 (1954). Cf. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91, 109-13, 117-18 (1950).

³³ The primary contention of the stamp companies, and the one which seems to form the basis of the majority of decisions invalidating anti-stamp legislation, is that the trading stamp system is merely a method of discounting bills in consideration of immediate payment in cash, which not only benefits the consumer, but, as well, affords the retailer a means of avoiding the extension of credit. See, note 61 *infra*. See, e.g., *Denver v. Frueauff*, 39 Colo. 20, 88 Pac. 389 (1907); *Lawton v. Stewart Dry Goods Co.*, 197 Ky. 394, 247 S.W. 14 (1923); *State v. Holtgreve*, 58 Utah 563, 200 Pac. 894 (1921). Cf. *Sperry & Hutchinson Co. v. McBride*, 307 Mass. 408, 30 N.E. 2d 269 (1940). Moreover, in the *Lawton* case, *supra* at 16, it was held that this legitimate cash discount device is as free from evils as are other common forms of business activity. For the court reasoned that the trading stamp (1) operates no more as a "lure to improvidence" than do the conventional methods of advertising, (2) has no greater a "parasitic" effect than do factors, brokers, agents, and commission merchants,

held to be an advertising device which contained none of the elements characteristic of lotteries, one of a small class of activities then held to be subject to legislative prohibition,³⁴ because the consumer's right to acquire the redemption premium was not contingent, but became "fixed" upon the purchase of the merchandise with which the stamp was given.³⁵

Secondly, it should be observed that a substantial number of these cases invalidated, under state constitutions, prohibitory legislation which exempted "self-redeemers," holding this to be a discriminatory classification for which no reasonable basis in fact demonstrably existed.³⁶ It is often difficult, therefore, to determine whether a particular decision rested upon the premise that the trading stamp is not a proper object of police power regulation, or, that such power existed but was improperly exercised.³⁷ Nevertheless, it is arguable that since the strict definition

(3) is characterized by nonredemption forfeitures which are similar to large funds on deposit in banks which have never been claimed, (4) gives an opportunity for coercion similar to that which has traditionally marked the practices of "wholesalers who desire to introduce some novelty or new line of goods," and (5) does not tend to "stifle competition" because it is employed by the large retailer since the advantages inuring to such retailer stem from the fact that "it buys in larger quantities, discounts its bills for cash, and is therefore able to sell at a cheaper price, regardless of whether it uses stamps or not."

³⁴ For a discussion of the effective scope of the various "lottery" statutes, see Pickett, *supra* note 23. See also, note 116 *infra*.

³⁵ "The right to have the stamps redeemed depends upon no contingency, chance, or lot whatsoever. The person receiving the stamps upon the purchase of goods is not in any degree deprived of his choice or will. Indeed, by the contract. . . [t]he right of selection among the articles kept by the stamp company in its store is expressly given. . . There is therefore no uncertainty as to the nature, character, or value of the premiums . . . with which the stamps are redeemed." *Winston v. Beeson*, 135 N.C. 271, 282, 47 S.E. 457, 460-61 (1904). See also, *Denver v. Frueauff*, 39 Colo. 20, 35, 88 Pac. 389, 394 (1907); *State ex rel. Simpson v. Sperry & Hutchinson Co.*, 110 Minn. 378, 126 N.W. 120 (1910).

³⁶ See, e.g. *People ex rel. Appel v. Zimmerman*, 102 App. Div. 103, 92 N.Y. Supp. 497 (4th Dep't 1905); *People ex rel. Madden v. Dycker*, 72 App. Div. 308, 76 N.Y. Supp. 111 (3d Dep't 1902); *State v. Dalton*, 22 R.I. 77, 46 Atl. 234 (1900); *State v. Dodge*, 76 Vt. 197, 56 Atl. 983 (1904). In cases, decided subsequent to the *Rast* case, invalidating statutes which, in effect, drew a distinction among persons issuing trading stamps, the basis of decision appears uniformly to have been based upon considerations of equal protection, with the question as to whether or not stamps could be regulated under the police power generally reserved. *Sperry & Hutchinson Co. v. State*, 188 Ind. 173, 122 N.E. 584 (1919); *Sperry & Hutchinson Co. v. Hoegh*, 246 Iowa 9, 65 N.W.2d 410 (1954); *People ex rel. Attorney General v. Sperry & Hutchinson Co.*, 197 Mich. 532, 164 N.W. 503 (1917); *State v. Holtgreve*, 58 Utah 563, 200 Pac. 894 (1921). Cf. *Opinion of Justices*, 226 Mass. 613, 115 N.E. 978 (1917). *Contra*, *State v. Wilson*, 101 Kan. 789, 168 Pac. 679 (1917); *State v. J. M. Seney Co.*, 134 Md. 437, 107 Atl. 189 (1919); *Sperry & Hutchinson Co. v. Weigle*, 166 Wis. 613, 166 N.W. 54 (1918).

³⁷ This is especially true of those decisions rendered before 1916 since the precedent invalidating stamp legislation existing prior to the Supreme Court's opinion in the *Rast* case was clearly insufficient to restrain the state courts from holding discriminatory

then accorded police power has been expanded substantially to include those measures enacted in the interest of public convenience or the general prosperity,³⁸ and, since judicial philosophies concerning the review of state economic legislation have been liberalized considerably, contemporary legislation, at least if uniformly prohibitory, might be upheld.³⁹ And even if such legislation were discriminatory—*i.e.*, if it excepted manufacturer's premiums and "self-redeemers"—recent developments in constitutional doctrine according greater legislative freedom in classification in economic matters might suffice to justify it.⁴⁰

III

ECONOMIC ANALYSIS OF TRADING STAMPS

Fundamentally, the contention of those advocating prohibition of trading stamps is that the non-stamp-giving retailer is injured by this "unfair" competitive device and that the economy is thereby impaired. The basic argument of the stamp companies, on the other hand, is that through the use of stamps, the consuming public is benefited by price savings on redemption merchandise. To what extent are these assertions supportable?

The immediate economic casualties of trading stamps are found

legislation invalid on grounds of due process. And although it is well settled that Supreme Court interpretations as to the fourteenth amendment due process clause are not binding upon state court interpretations of similar constitutional provisions, they are, however, highly persuasive and perhaps sufficient to negate these pre-*Rast* decisions as authority for the conclusion that trading stamps are immune from police power regulation. See, *Sperry & Hutchinson Co. v. Hoegh*, 246 Iowa 925-38, 65 N.W.2d 410, 419-26 (1954) (dissenting opinion).

³⁸ See note 32 *supra*. Although this broader concept of police power has been less readily adopted by state courts, it was recognized by the Supreme Court as early as 1906. *Chicago, B. & Q. Ry. v. Drainage Commissioner*, 200 U.S. 561, 592 (1906).

³⁹ The landmark case in this area is *Nebbia v. New York*, 291 U.S. 502 (1934) in which the Supreme Court abandoned the doctrine which limited regulation of business to those "affected with the public interest" and declared that "[s]o far as the requirement of due process is concerned, and in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose." 291 U.S. at 537. See also, *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936); CORWIN, *COURT OVER CONSTITUTION*, 107-08 (1938); HAMILTON, *THE PATH OF DUE PROCESS OF LAW, THE CONSTITUTION RECONSIDERED* 167 (Read ed. 1938). Although, in the light of this precedent, a substantial number of state courts have been reluctant to upset state economic regulation, there are a few which have continued freely to disregard legislative policies in this area by distinguishing the federal precedents, or by adhering to a stricter construction of state constitution due process provisions. See generally, *Paulsen*, *supra* note 32. Notes, 44 Ky. L. J. 3. (1956); 39 MINN. L. REV. 804 (1955).

⁴⁰ *Goesaert v. Cleary*, 335 U.S. 464 (1948); *State v. Wilson*, 101 Kan. 789, 168 Pac. 679 (1917).

among the retailers of two separate categories: first, the non-stamp-giving retailers competing in markets with stamp-giving retailers; and second, retailers competing with companies in the distribution of the type of merchandise given by the companies as redemption premiums.

With respect to injury—i.e., loss of trade—it is clear that the non-stamp-giving retailer is disadvantaged *vis-à-vis* his stamp-giving competitor; this is, in fact, the very *raison d'être* of trading stamps. The measure of the successful attainment of this purpose is to be found in the widespread popularity of stamps as a merchandising technique.⁴¹ While the degree of injury suffered will vary with the development of stamps within the consumer area⁴² that injury exists and is substantial appears to be indisputable.

There seems to be little doubt that retailers in competition with stamp companies in the distribution of premium merchandise also suffer widespread and substantial injury. Many consumers undoubtedly believe that the merchandise that they receive at stamp-company redemption outlets is, as has been implied, "free."⁴³ Those who suspect that they may have paid for the stamps in higher prices for the commodities with which the stamps were "given" often believe that the price was no higher than the value of the merchandise which the stamps will obtain, or, that if it was higher, the process is a painless method of prepayment for the redemption item.⁴⁴ In any case, however, the effect is the same: the diversion of trade from the traditional purveyor of such commodities to stamp-companies.

The discrimination inherent in the exemption of manufacturer's premiums from the operation of prohibitory statutes⁴⁵ appears justified

⁴¹ See note 1 *supra*.

⁴² In an area where the stamp-saving habit has been conditioned and one or a few brands of stamps predominate, the injury will be greater.

⁴³ See notes 58 and 127 *infra*.

⁴⁴ There is some evidence that stamp-saving consumers recognize that they pay for stamps in the form of higher prices. For example, in a survey conducted in the grocery trade in Denver, Colorado, almost one-half of the stamp-saving consumers polled believed that they paid for stamps through higher prices. Study Prepared by the Bureau of Business and Social Research, University of Denver, March 1954, pp. 13-14. The stamp companies, though contending that consumers do not pay for stamps, argue that even if they do, this is still beneficial to them as it provides a method of saving in small amounts to obtain the type of merchandise offered as redemption premiums. INTERVIEW. Another suggestion as to why consumers purchase with knowledge that they are paying for the stamps is that the housewife, in the typical instance, while not desirous of spending grocery money directly for household luxuries, may do so indirectly, thus appearing to her family as frugal rather than frivolous. New York Times, Sept. 30, 1956, § 3 p. 1.

⁴⁵ See note 26 *supra*.

on the basis of their effect upon the two types of retailers most injured by the stamp operation. The non-stamp-giving retailer appears totally unaffected, for while such premium offers may shift trade volume from one product to another, they do not shift trade between retailers. The retailer of premium merchandise, though susceptible to some reduction in sales of those commodities which manufacturers employ as premiums, does not experience any great degree of injury because manufacturers generally offer as premiums an extremely limited variety of low cost items constituting only a small portion of the retailer's stock in trade. Whether similar justification exists for the exemption of self-redeemers⁴⁶ is less clear; although it can be argued that because they are small and local, the demand for their stamps would not be great and would not shift volume substantially, and injury to non-stamp-giving merchants would, therefore, be insignificant.⁴⁷ Similarly, injury to retailers of premium merchandise would be insubstantial since the self-redeemer normally redeems only from his stock in trade. In view of the fact that some large grocery chains are self-redeemers, however, this basis of distinction should be subjected to closer scrutiny.⁴⁸ These justifications for exemptions, incidentally, would be quite compatible with a legislative finding that stamps are inherently injurious, for the legislature may distinguish between degrees of injury, and it is unnecessary for it to eliminate all evils of the area in which it acts.⁴⁹

For retailers who employ them, stamps are a cost which varies directly with total sales. The retailer, in order to maintain the profit his enterprise earned prior to the installation of stamps, must either raise prices or so increase his sales volume that the consequent extra profit will defray the added cost of stamps.⁵⁰ While, undoubtedly, there are

⁴⁶ *Ibid.*

⁴⁷ Such an argument was favorably considered by the court in *State v. Wilson*, 101 Kan. 789, 168 Pac. 679 (1917) which upheld the discriminatory Kansas statute. See note 26 *supra*.

⁴⁸ See VREDENBERG, *op. cit. supra* note 1, at 53.

⁴⁹ *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Railway Express Agency v. People of the State of New York*, 336 U.S. 106 (1949).

⁵⁰ The companies have suggested that even though trading stamps are a cost of business for the retailer, they need not be an extra cost for they may replace other advertising and promotional expenses. It is undoubtedly true that the extra cost of stamps would be diminished in some degree by this substitution. On the other hand, some retailers, especially grocers, make a practice of issuing extra stamps on certain days, often called "double stamp days," and are permitted so to do by many company contracts. Here, the cost of the stamps in relation to sales has doubled. Though this practice has been defended by the companies on the theory that the bonus stamps are given on "slow" days thus spreading sales volume more evenly through the week and

a few situations where the installation of stamps will increase profits to such a degree,⁵¹ to the extent that it does not, the retailer, in most situations, must raise his prices proportionately. Thus, the cost of stamps to consumers resulting from higher prices will vary inversely with the power of stamps to attract a larger sales volume and the ability of the retailer to keep other costs constant. Although some price increase is necessary in the great number of cases, it will be somewhat less than the cost of stamps to the retailers; that is, part will be absorbed, part passed on to the consumer.

In considering the factors influencing the price which the consumer pays for stamps, two other elements should be accorded some weight. First, as more of the individual retailer's competitors adopt stamp plans, the power of stamps to increase his sales volume will diminish, and the price increase to the consumer will tend to approach the cost increase to the retailer. Second, there is a tendency for non-stamp-giving retailers to adopt price reductions as a defensive measure,⁵² and to the extent that this tactic is adopted, the consumer is paying more, in a relative sense, by continuing to purchase at the stamp-giving store. While reduction of prices is only one method of regaining trade lost to stamp-giving stores, any method which accomplishes this result will lower volume at the stamp-giving store, causing a greater share of the costs of stamps to be borne by its remaining customers.

As to the basic arguments, then, it may fairly be concluded that injury to retailers is substantial and that consumers share some burden of the cost of stamps, though some price saving is ordinarily involved as well. Moreover, the injury and the savings are relatable—that is, the greater the savings to the consumer, the greater the injury to the non-stamp-giving retailer.

While the questions of injury to retailers and benefit to consumers are basic to an informed judgment concerning the legality of the trading stamp operation, both those advocating and those resisting prohibition have proffered, though seldom fully articulated, further rationales to buttress their fundamental contentions.

Merchants, apparently in response to the stamp companies' charge

effecting a more efficient use of store facilities, it is to be doubted whether the economies thus obtained are sufficient to offset the cost of the extra stamps given.

⁵¹ See the discussion of the requirements for successful installation of a stamp plan in VREDENBURG, *op. cit. supra* note 1, at 62.

⁵² In a recent survey conducted by Selling Research Inc., it was found that 52% of non-stamp-using grocers and 23% of non-stamp-using druggists employ price reduction as a defense against stamp-using competitors. Editor & Publisher, March 16, 1957, p. 19.

that prohibitory measures are "special interest legislation," have attempted to argue that trading stamps injure the economy directly as well as indirectly through injury to themselves. Thus, they contend that even if certain price savings are apparently afforded the consumer, this is not an unmitigated benefit. First, price savings inure to the consumer only upon redemption. Nonredemption of stamps, for which a price has probably been extracted, is clearly a detriment to the economy.⁵³ While consumer loss through non-redemption is an important and inherent feature of the trading stamp operation, an argument for prohibition of trading stamps based on this factor is not persuasive, in as much as less heroic measures for consumer protection appear feasible.⁵⁴

Second, stamps are normally distributed to consumers by retailers whose commodities fall within the category of "necessities" (e.g., groceries, gasoline, fuel, etc.), whereas the predominant type of merchandise offered as redemption premiums is more in the nature of "luxuries" (e.g., toys, appliances, sporting goods, etc.). The argument then proceeds that since the consumer pays for stamps to some degree, a given amount of money will purchase fewer "necessities." People in low-income groups who cannot afford "luxuries" and who buy at stamp stores are forced either to manage with fewer "necessities" or to obtain increased income in wages, which, in turn, increases prices, forcing up the cost-of-living index.⁵⁵ This contention, while theoretically sound, seems of secondary importance as a basis for the prohibition of the stamp industry because of the obvious difficulty in obtaining adequate supportive economic data.

The third contention urged by critics of the stamps is that the injury to retailers has the effect of eliminating the small independent merchant, especially in such fields as groceries and drugs.⁵⁶ As competition

⁵³ The stamp companies, of course, argue that they use the funds so obtained to provide premiums for customers at lower prices. But see, text to notes 65-66 *infra*.

⁵⁴ Namely, escheat of the reserves maintained by the company for unredeemed stamps. See text to notes 74-78 *infra*.

⁵⁵ Because only increased efficiency in production or distribution is capable of raising absolute consumer demand, trading stamps merely shift demand from "necessities" to "luxuries."

⁵⁶ The stamp companies, of course, contend that stamps assist the small independent retailer to compete with the larger chain stores. Sperry & Hutchinson Co., for example, claims that 99% of its 60,000 "licensees" are "small, independent merchants." Brief submitted by the Sperry & Hutchinson Co. to Hearings conducted by the Consumer Counsel to the Governor of New York, Oct. 2, 1956, p. 15. Such a statistic is entirely misleading. First, a substantial number of these "licensees" are in a type of trade in which nearly all retailers are small, e.g., gasoline retailers. Second, the figure is meaningless without an analysis of the volume of stamps distributed by "licensees" of different

diminishes, monopoly power of stamp-giving retailers, especially chain stores, increases, which, when exercised, will injure consumers. Thus, while in the short run, the consumer may benefit, in the long run, he suffers. Manifestly, this argument has weaknesses, especially in its assumption that monopoly power could effectively be exercised against the check of lower prices offered by the remaining competitive retailers.⁵⁷

The stamp companies, aside from arguing the case for consumer savings, have presented several affirmative defenses based upon the economic function and utility of the trading stamp operation. They contend that stamps, in essence, serve a dual purpose: for retailers, they function as a form of advertising; for consumers, they provide merchandise. The stamp companies contend that, per se, both of these functions are recognized as proper, the interdiction of which would be constitutionally unjustified. Moreover, the companies have chosen to argue that in performing these functions, they contribute valuable services to the economy.

As to the "mere advertising" defense, it is necessary to recognize at the outset that advertising, as such, is not immune to governmental regulation where it may operate to defraud the public. The opponents of stamps, thus, condemn as fraudulent the representation that stamps

sizes; one large grocery chain may well have a sales volume exceeding that of thousands of independent grocers. Moreover, irrespective of the distribution of a stamp company such as Sperry & Hutchinson, because the trend of larger chain groceries is to form, own, or control a stamp company of their own, the conclusion that stamps injure smaller competitors remains. If a smaller retailer in attempting to hold his share of the trade adopts stamps, the result is often unsatisfactory, for the nature of the stamp plan's operations tends to limit its efficacy to larger enterprises. See VREDENBURG, *op. cit. supra* note 1, at 63.

An indication of the adverse affect of stamps upon the small, independent merchant in the grocery field is reflected in a preliminary report of the Department of Agriculture which found that while sales volume in food supermarkets using stamps gained 10.2% in the first half of 1956, small stores using stamps actually lost 4.4% sales volume. U.S. Department of Agriculture, *Do Trading Stamps Affect Food Costs?*, Marketing Research Report No. 147, Jan. 1957. See, Wall Street Journal, Jan. 2, 1957, p. 3. Furthermore, it appears that some of the larger stamp companies discriminate against small retailers with respect to the price of stamps. See note 133 *infra*.

⁵⁷ Another contention that has been advanced by critics of stamps is a modified version of the "lure to improvidence" argument announced by the Supreme Court in the *Rast* case, see note 29 *supra*. As first enunciated, it appears to refer to possible consumer injury resulting from excessive buying to obtain stamps for redemption premiums. Thus stated, the argument is unrealistic and properly subject to the criticism it received. See note 29 HARV. L. REV. 779 (1916). See also, *State v. Lothrop-Farnham Co.*, 84 N.H. 322, 150 Atl. 551 (1930); *People v. Victor*, 287 Mich. 506, 283 N.W. 666 (1939). However, if the "improvident buying" argument is regarded as buying with undue disregard of quality or price, the contention that there is substantial likelihood of consumer injury has considerably more merit. See, Wolff, *Sales Promotion by Premiums as a Competitive Practice*, 40 COLUM. L. REV. 1174, 1177 (1940).

are "free" because, ordinarily, the consumer pays at least a portion of the cost of stamps in the form of higher prices. This is a tenuous basis for complete prohibition of the companies' activities, however, for although it is not known to what extent the companies utilize the term "free" in their advertising, the obvious and direct remedy would be to prohibit its use.⁵⁸

Even assuming, however, that the stamp company in pursuing its advertising function is not susceptible to prohibition, there is still some question as to the economic utility of this activity. Under classical definitions, the function of advertising is to apprise consumers of their needs, what products may satisfy these needs, and where and at what price these products may be obtained.⁵⁹ The promotional method of the stamp companies would not seem to satisfy this standard of advertising, for it publicizes only the redemption premiums, not the commodities sold by stamp-giving retailers. Seemingly, then, this claim of economic utility merits little consideration. Indeed, since stamps merely induce purchasers to trade with one retailer⁶⁰ rather than another, no net benefit accrues to the economy.

The other basis for the stamp companies' claim of economic utility

⁵⁸ It is quite possible that the Federal Trade Commission may take action to prevent the use of the word "free" in stamp company advertising as a "deceptive practice" under § 5 of the Federal Trade Commission Act. See note 127 *infra*. It would seem to be within the power of a state legislature similarly to prohibit the word's use. Even then, it might reasonably be contended that, in light of the widespread acceptance of the operation and past practice, this measure alone would be insufficient to protect the public. A stronger remedy might be state legislation requiring companies to print in each stamp-savings book an express denial of any claims that premium merchandise is "free." Even though such legislation might cause a popular disaffection for stamps which in turn would alleviate some injury to non-stamp retailers, because its primary purpose would be to protect consumers, such action would appear to be within the legislative power.

⁵⁹ For a classical definition of advertising, see Mr. Justice McKenna's opinion in the *Rast* case, note 29 *supra*.

⁶⁰ The companies contend that stamps are a form of "cash discount," inducing consumers to pay cash and thereby saving the retailer the expense of credit operations. Brief submitted by the Sperry & Hutchinson Co. to Hearing conducted by The Consumer Counsel to the Governor of New York, Oct. 2, 1956, p. 8. This argument, however, disregards not only the fact that most trading-stamp retailers would operate on a cash basis irrespective of their use of trading stamps, but also that the companies themselves permit the distribution of stamps to credit purchasers provided that they pay their accounts within normal credit periods. Moreover, even if a retailer experienced a reduction of credit problems through the handling of stamps, such a benefit would at least be offset by the additional expense of operating a stamp plan. Therefore, while the "cash discount" approach to the stamp operation may possess some historical warrant, its application to present legal and economic problems, confuses objective discussion in this area. Cf. Comment, *Trading Stamps: A Challenge to Regulation of Price Competition*, 105 U. PA. L. REV. 242, 247-49 (1956).

is that their business is similar to that of chain stores and mail-order houses which are now recognized as legitimate, although they were also subjected to some legal restriction at their inception.⁶¹ However, the claimed similarity to these large-scale distributors appears to lie solely in the fact that the attacks on them, as well as trading-stamp operations, have been sponsored by small, independent merchants;⁶² otherwise, their economic functions at present appear quite distinct. Chain stores and mail-order houses seek to maintain an advantageous competitive position by passing on the benefits of large-scale economies to the consumer in the form of price savings. The stamp companies contend that they, too, share the benefits of their economies with the public, but indications are that this, while possible, is not so at present.

The merchandise purchased by stamp companies as redemption premiums typically consists of appliances, sporting goods, toys, and some hardware and soft goods—items which, because of their limited demand, normally require a high retail mark-up. The companies buy these items in bulk directly from the manufacturers, thus eliminating middlemen's profits and securing generous quantity discounts.⁶³ This merchandise is then traded for stamps in a market guaranteed by the original sale of the stamps to the stamp-giving retailers. The genius of the stamp companies' promotion is that the "hard-selling article" is tied to the fast-selling necessities, which enables the company to reap the high profit margin rewards of massed distribution of "hard-selling articles." This, plus forfeitures to the company resulting from non-redemption afford ample opportunity for substantial profits in the stamp operation.⁶⁴ The crucial question, however, is to what degree these profits are shared with the consumer.

Stamp companies, as has been noted, issue stamps to the merchant

⁶¹ See references in OPPENHEIM, CASES ON UNFAIR COMPETITION 682 (1948).

⁶² The stamp companies contend that besides the pressure exerted upon state legislatures by retailer associations, that the present legislative, judicial and investigatory activity directed against trading stamps was instigated and directed by a large grocery chain, which, subsequent to the removal of its president, has called a truce in its war on trading stamps. INTERVIEW. For another view of this story, see, Comment, 24 TENN. L. REV. 557 (1956). Nevertheless, judging from the militant attitude of the retail trade associations, it is improbable that the anti-stamp movement will subside.

⁶³ It is widespread rumor that the Sperry & Hutchinson Company is the largest "distributor of sterling silver and one of the largest buyers of small appliances." Wall Street Journal, Apr. 3, 1957, p. 1. As to the legality of quantity discounts under the Robinson-Patman Act, see note 129 *infra*.

⁶⁴ In addition to the nonredemption forfeitures themselves, the company obtains the investment returns, prior to the time of redemption, of the money received by the company from the retailer. See Comment, 24 TENN. L. REV. 557, 568 (1956).

at the price, on the average, of one-quarter of a cent per stamp. Most companies value the stamp in the possession of the consumer at this same figure, and redemption premiums are assigned a "cash" value in terms of stamps equal to the average price of that article on the retail market.⁶⁵ Thus, the economies of scale are apparently earmarked for stamp company surplus rather than for the consumer. It must be remembered, however, that while this seems to be the present operation of the companies, it is quite possible that they may alter their policies and allocate a portion of these profits to consumers. This could be done by altering any one of three variables. They might reduce the price of the stamps to the retailers; or raise the arbitrary valuation of the stamps in the possession of the consumer; or "price" redemption premiums, in terms of stamps, below the retail price. It appears, however, that their existing practice sharply differentiates stamp companies from chain stores and mail-order houses on the basis of economic function and utility.

Analysis of the conflicting contentions of the stamp companies and their opponents indicates that substantial economic detriment flows from the trading-stamp operation and is only partially compensated for by the economic utility of the industry. Should prohibitory measures be enacted, however, this superior economic argument might well be counterbalanced by the overwhelming, though dated, legal precedent to the contrary. Nevertheless, it is conceivable that if such prohibitory legislation were enacted, sufficient grounds for judicial sanction could be found.

IV

STATE LEGISLATIVE PROPOSALS

In 1955, over fifty bills, apparently designed to frustrate stamp-company operations, were introduced in the legislatures of twenty-four states,⁶⁶ but only two were adopted.⁶⁷ Of these, one was invalidated

⁶⁵ INTERVIEW.

⁶⁶ Bills were introduced in the legislatures of the following states: Alabama, Arkansas, Arizona, California, Colorado, Florida, Idaho, Illinois, Iowa, Maryland, Minnesota, Montana, Nebraska, New Mexico, New York, North Carolina, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, Wisconsin and Wyoming. VREDENBERG, *op. cit. supra* note 1, at 149; *Advertising Age*, XXVI, No. 30, p. 60 (July 25, 1955).

⁶⁷ The North Dakota Legislature enacted a statute which authorizes each county in the state to levy a \$6,000 license fee upon any stamp company operating within county lines. Letter from Gerald G. Glaser, Ass't Attorney General of North Dakota, to the *Duke Bar Journal*, Oct. 18, 1956, on file in Duke Law Library. The Utah Legislature amended the Unfair Sales Act which deems it illegal to reduce prices on the retail level through the use of trading stamps. INTERVIEW.

by a referendum in the general election of 1956,⁶⁸ and the effectiveness of the other has been abated pending a decision as to its constitutionality.⁶⁹ These bills reflect a wide range of hostility to trading stamp operations, but significantly, only a few of the proposals advanced would have expressly prohibited stamp operations⁷⁰ or imposed gross receipts taxes⁷¹ or license fees so excessive as to be tantamount to prohibition.⁷² Two popular provisions would have required registration of companies and agents with a moderate license fee and bonding of companies.⁷³ But the most important type of provision, introduced in fourteen different legislatures, would have escheated to the state the reserves representing unredeemed stamps.⁷⁴

⁶⁸ The North Dakota statute, note 67 *supra*, was submitted to a referendum on November 6, 1956, and was defeated by a vote of 159,801 to 84,319. INTERVIEW.

⁶⁹ The constitutionality of the Utah statute, as amended, note 67 *supra*, is presently being challenged by the Sperry & Hutchinson Co. INTERVIEW.

⁷⁰ Outright prohibition of stamps are sought in the legislatures of Illinois, Minnesota, North Dakota, South Dakota, Wisconsin and Wyoming. VREDENBURG, *op. cit. supra* note 1, at 149.

⁷¹ Proposals to tax the gross receipts of trading stamp companies at a specified percentage were introduced in Idaho, Iowa, Nevada and Texas. VREDENBURG, *op. cit. supra* note 1, at 149. The Texas proposal would have imposed "an occupational tax . . . equal to five per cent (5%) of the gross receipts received by the [stamp company] from business done in the State." House Journal, Apr. 18, 1955, p. 1690. On February 21, 1957, the Tennessee Legislature amended 12 TENN. CODE ANN. § 67-4203, Item 106 (1955), to impose a two per cent tax upon the "gross receipts derived from the sale within the state . . . of all goods, wares or merchandise . . . with which any stamps . . . are delivered to the purchaser." This tax does not apply, however, to the merchant who issues stamps redeemable at their face value in cash or in merchandise from his general stock or the manufacturer or packer who both issues and redeems stamps or coupons.

⁷² Prohibitive license fees were proposed in the legislatures of Alabama, Colorado, Minnesota, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Tennessee and Wyoming. VREDENBURG, *op. cit. supra* note 1, at 149. As to the extent of the burden which a stamp company might be required to assume under one of these provisions, see note 26 *supra*.

⁷³ Most of the recently proposed bills, except those which would have prohibited outright the issuance of stamps, fairly uniformly required the registration of stamp companies and their agents, and/or a bond at a fixed sum or at a percentage of stamp company sales in order to protect retailers against possible non-performance by the stamp company of the company-retailer contract and to insure the availability to consumers of the redemption premiums. A far more restrictive protective device was the proposal introduced in the New York legislature which would have required, as a prerequisite to issuing stamps, that a "certificate to engage in such business [be granted] by the banking department of New York." It further provided that "[n]o [stamps] shall be sold or issued unless there shall be placed on deposit in a bank or trust company, a fund or sum of money equal to the value of such [stamps] under the supervision and direction of the banking department. Such fund or sum of money shall remain on deposit until all outstanding [stamps] are redeemed." N.Y. Assembly Bill No. 2085, Feb. 1, 1956. It has been reported that this proposal has again been submitted to the New York legislature. N.Y. Times, Feb. 15, 1957, p. 14.

⁷⁴ Arkansas, California, Colorado, Florida, Idaho, Maryland, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, and Utah. VREDENBURG,

A significant characteristic of the stamp operation is the fact that some of the stamps distributed are never presented to the company for redemption.⁷⁵ It requires no subtle analysis to demonstrate that the funds received by the company from the retailer and against which these unredeemed stamps were issued should not inure to the stamp company. Rather, since these funds were obtained from retailers and consumers within the state, the benefit thereof should logically accrue to the state itself.⁷⁶ While this legislative object seems clearly justified, the efficacy

op. cit. supra note 1, at 149. By far, the most comprehensive escheat proposals were those introduced in the Kentucky, Colorado, and Nebraska legislatures. For example, Ky. H.B. No. 4, 4th Sess., April 9, 1956, provided that: (1) a graduated license tax be imposed upon stamp-issuing retailers, (2) a minimum tax of \$5000 or .5% of gross receipts be levied upon stamp companies, (3) a bond be posted by stamp companies, (4) the date and state of issue and cash value be printed on all stamps, (5) stamps must be redeemable in numbers aggregating not less than ten cents in cash or in merchandise at the option of the holder, (6) stamp companies account for the total number of stamps both issued and redeemed during the statutory period, and (7) that each savings book contain the statement, "Trading Stamps are redeemable . . . only if offered for redemption within two years of the printed date of issue." See also, Neb. H.B. No. 442, 67th Sess., Jan. 31, 1955; Colo. "Escheat Bill," 1955 Sess. (unpublished), on file in Duke Law Library.

⁷⁵ See note 77 *infra*.

⁷⁶ The theory that the funds maintained by the stamp companies as reserves for unredeemed consumer claims should inure to the state rests, to a great extent, upon the common law concepts of escheat. Originally, the doctrine of escheat applied only to real property and was inseparable from the concepts of feudal tenure. HOLDSWORTH, A HISTORICAL INTRODUCTION TO THE LAND LAW, 33 (1927); 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 351 (2d ed. 1923). Personal property, on the other hand, was not considered subject to escheat. Instead, it passed to the Crown under the doctrine of bona vacantia upon the theory that, as to abandoned property, the Crown's claim on behalf of society was more expedient and equitable than that of another. This latter doctrine, as an incident of sovereignty rather than feudal tenure, was, in substance, early appropriated by state legislatures, limited only by state constitutions and the fourteenth amendment. *Anderson National Bank v. Lockett*, 321 U.S. 233, 240 (1944); *United States v. Klein*, 303 U.S. 276 (1938); *Security Savings Bank v. California*, 263 U.S. 282 (1923).

Whether this power of appropriation is exercised in the form of escheat legislation, which perfects in the state title to the unclaimed property, or in the form of abandoned property legislation, which merely declares the state custodian, its purposes—to protect and conserve property from depletion and depreciation, and to enhance alienability—seem justified. Moreover, the interest which accrues to the state from the property while in custody as well as its value upon escheat present ample grounds to support this legislation as a proper revenue measure. Accordingly, the states have extended their escheat power beyond the objects of real and personal property to include such intangibles as unpaid bank deposits, wages, principals of trusts, life insurance proceeds, stock certificates, and unpaid dividends. See generally, Garrison, *Escheat, Abandoned Property Acts and Their Revenue Aspects*, 35 KY. L. J. 302 (1947); Shestack, *Disposition of Unclaimed Property—A Proposed Model Act*, 46 ILL. L. REV. 48 (1951); Comment, 1 STAN. L. REV. 342 (1949); Notes, 27 IND. L. J. 113 (1951); 43 ILL. L. REV. 709 (1948); 26 SO. CALIF. L. REV. 319 (1953); 35 VA. L. REV. 336 (1949); 34 VA. L. REV. 90 (1948).

of an escheat policy would seem to be proportional to the incidence of nonredemption.

Unfortunately, the actual redemption rate of stamps is impossible to determine under the companies' present method of operation, because it cannot be known what portion of the stamps presently outstanding are lost or destroyed, and what portion will eventually be redeemed, nor, whether the stamp redeemed today was issued last week or ten years ago.⁷⁷ It would seem that the redemption rate would vary proportionally with the size of the company, its facilities for redemption, the quality of its premiums, and other factors affecting the popularity of its stamps and, therefore, the inclination of the purchaser to save them for redemption. Even though the average rate of redemption for all companies cannot be known, it appears certain that under the present system, substantial sums are funneled annually into stamp-company treasuries as a result of nonredemption.⁷⁸ The size of these sums would seem sufficient to warrant judicial approval of escheat legislation.

Notwithstanding the existence of a proper legislative policy, however, it is possible that certain constitutional limitations may prevent successful application of the proposed escheat legislation. Some insight into the nature of these limitations is afforded by an examination of the one attempt that has been made to escheat obligations measured by unredeemed stamps,⁷⁹ although this effort was made not under an escheat statute specifically directed at stamps, but, rather, pursuant to a general personal property escheat provision.

In 1955, proceedings, now pending trial and decisions, were instituted in the Chancery Division of the Superior Court of New Jersey against the Sperry & Hutchinson Company to escheat "cash obligations" owed by the company on unredeemed trading stamps issued prior to certain statutory periods on the ground that they represent abandoned prop-

⁷⁷ Estimates as to the rate of stamp redemption vary widely. For example: The Sperry & Hutchinson Company claims 94% redemption; Southern Premium Company of Atlanta claims 60%; the retailers argue that "fly-by-nighters" redeem at a rate of 5-10% but that the redemption rate for all stamps is 60%. *Business Week*, May 19, 1956, p. 43; *Wall Street Journal*, Aug. 18, 1953, p. 8.

⁷⁸ One commentator has estimated that of the \$490 million in sales made annually to retailers by approximately 370 trading stamp companies, at an estimated redemption rate of 95%, \$25 million in unredeemed stamps inure to the companies. *VREDENBURG, op. cit. supra* note 1, at 34-36. Upon the basis of 60% redemption, the rate argued by the retailers, as applied to the 1956 estimate of \$600 million in stamp sales, \$240 million in nonredemption forfeitures would inure to stamp companies. *Cf. note 77 supra.*

⁷⁹ *State v. Sperry & Hutchinson Co.*, Docket No. C 1048-54, Docket No. C 1049-54 (Chancery Div., Super. Ct. of N.J. 1956).

erty.⁸⁰ In response, the company has contended⁸¹ that the obligations represented by unredeemed stamps are not proper objects of escheat, and that if an escheatable object does, in fact, exist, it must be the stamp itself. It is argued that these obligations are not fixed and definite—i.e., “debts”—a characteristic of shares of stock, unpaid dividends, insurance policies and unclaimed bank deposits, all admittedly subject to escheat.⁸² For it is reasoned that once the company has delivered the stamps to the retailer with a promise to redeem them, the contract is fully executed as between the company and the retailer, and the consumer who ultimately receives the stamps in connection with the purchase of goods becomes, in effect, a third party beneficiary of the contract.⁸³ As such, the consumer is said initially to possess not a direct right against the company, but merely a right residing in the stamp itself which becomes fixed only upon presentation of a requisite number of stamps to the company for redemption.⁸⁴ Moreover, the company’s initial obligation to the consumer, as stipulated in the company-retailer contract, is not definite since under its terms the company has expressly reserved the right to alter the redemption value of the stamp at any time prior to the presentation of the stamps for redemption.⁸⁵ Thus, as the company contends, it seems clear that the obligation to redeem trading stamps, unlike the well-

⁸⁰ The proceedings against Sperry & Hutchinson Company were initiated under two statutes. The first action, Docket No. C 1048-54, was brought pursuant to the Custodial Escheat Act, N.J. STAT. ANN. 2A: 37-29 (1952), which provides that the state may take into its protective custody property consisting of cash, dividends, interest or wages owed by a corporation organized or doing business within the state which belongs to a person who remains unknown or whose property remains unclaimed for a period of five successive years. And, upon the expiration of the period of protective custody, the state is authorized to commence escheat proceedings. Although the Chancery Division dismissed the state’s complaint under this statute on the grounds that it applies only to dividends payable upon capital stock, interest payable upon formal instruments of indebtedness, and wages, the Supreme Court of New Jersey, on appeal, held it applicable to funds held by the company. *State v. Sperry & Hutchinson Co.*, —N.J.—, 127 A.2d 169 (1956). The second action, Docket No. C 1049-54, was initiated under the Personal Property Escheat Act, N.J. STAT. ANN. 2A: 37-14 (1952), which authorizes the direct escheat to the state of any personal property, intangibles as well as tangibles, which has remained abandoned for a period of fourteen years prior to the commencement of the escheat proceedings.

⁸¹ In its answer to the New Jersey complaint, Sperry & Hutchinson set forth thirteen defenses, only a few of which are considered in this paper.

⁸² See note 76 *supra*.

⁸³ Proposed Escheat Legislation Concerning the Sperry & Hutchinson Cash Discount Stamps, New York; Sperry & Hutchinson Company, p. 3 (unpublished), on file in Duke Law Library.

⁸⁴ *Id.* at 4.

⁸⁵ See Sperry & Hutchinson contract, Form 22 M Rev. Sept. 10, 1956, on file in Duke Law Library.

recognized objects of escheat; is not a "debt" to the consumer. If the unredeemed stamps alone represent the extent of the company's obligation to the consumer, the state's sole legally effective method of escheat would be to present such stamps to the company for redemption. This would obviously be a completely unsatisfactory and impractical arrangement for the state. Accordingly, if the company's rationale is adopted, the New Jersey court will be impelled to hold the present escheat provisions inapplicable.⁸⁶

Even assuming that the obligation itself, rather than the stamp, constitutes a proper object of escheat, the question remains whether the New Jersey statute could be constitutionally applied, since the state would encounter considerable difficulty in establishing which unredeemed stamps, if any, were issued prior to the statutory period. Moreover, an arbitrary estimate of this amount would undoubtedly be assailed as an unconstitutional exercise of the taxing power. Thus, it is clear that unless the typical personal property escheat statute is amended, any attempt to levy upon a stamp company's reserves for unredeemed stamps will probably be unsuccessful.

Under the recently proposed escheat legislation, with its comprehensive provisions drafted specifically to apply to stamp companies,⁸⁷ it

⁸⁶ It seems clear that a fundamental obstacle to a constitutional application of the New Jersey escheat statutes is that, in addition to the impossibility of determining the number of outstanding stamps, the company has retained not only the power to alter the value of the stamps, but also, is obligated only to redeem them in merchandise. On the other hand, the fact that the statute, as applied, would in effect modify the company-retailer contract by requiring the former to redeem stamps actually not presented for redemption, would not appear to prevent a valid escheat. For example, in *Connecticut Mutual Life Insurance Co. v. Moore* 333 U.S. 541 (1948), the state of New York sought to obtain custody of life insurance proceeds payable to New York beneficiaries on policies issued by a foreign corporation upon lives of New York residents. The insurer contended that the statute transformed into a liquidated obligation one that was contingent upon surrender of the policy with proof of death, and, moreover, that it deprived it of certain defenses which might be employed to bar the beneficiary's claim, all in violation of the contracts clause. Nevertheless, the Supreme Court sustained the New York court's declaration of custody and stated that although the insured "may find it more difficult to establish other defenses . . . we do not regard the statute as unconstitutional because of these enforced variations from the policy provisions. . . . The fact that claimants against the company would be required to comply with certain policy conditions does not affect our conclusion. The state may more properly be beneficiary of abandoned property than another person. . . . When the state undertakes the protection of abandoned claims, it would be beyond a reasonable requirement to compel the state to comply with the conditions that may be quite proper as between the contracting parties. The state is acting as conservator, not a party to a contract." 333 U.S. at 546-47. Cf. *Anderson National Bank v. Tuckett*, 321 U.S. 233, 241 (1944); note 76 *supra*.

⁸⁷ See note 74 *supra*.

is highly doubtful that any of the objections urged in the New Jersey case could effectively be raised. First, the proposed bills uniformly specify that the "cash" value of the stamp be printed on its face and that redemption be provided for in nominal numbers,⁸⁸ thus enabling a particular consumer to demand redemption practically upon receipt of the stamps. This provision seems clearly to obviate the objection that the obligations represented by stamp reserves are not fixed and definite.⁸⁹

Moreover, other constitutional infirmities present in the New Jersey-type escheat statute as applied to the trading-stamp situation also seem substantially eliminated by the recent bills. The new proposals typically provide that the date and state of issue must appear on the face of the stamp⁹⁰ and that the stamp companies must periodically account for the number of stamps issued and unredeemed during the statutory period.⁹¹ Thus, an accurate assessment may be made of a particular company's escheatable obligations, and the argument that it is unreasonable to require the companies to ascertain those subject to escheat is effectively rebutted.⁹²

A further constitutional objection may be entered, however, with respect to the relatively short period made available for the redemption by the new proposals.⁹³ Since the sine qua non of traditional escheat

⁸⁸ For example, Ky. H. B. No. 4, 4th Sess., April 9, 1956, provided that "[a]ny issuer or agent for redemption of trading stamps shall . . . redeem . . . or cause [such stamps] to be redeemed either in goods or in cash . . . at the option of the holder . . . and any number of such trading stamps shall be so redeemed at the stated value as printed upon the face thereof . . . provided however, that the aggregate stated value of . . . stamps offered for redemption be not less than ten cents."

⁸⁹ The cash option provision appears to eliminate the difficulty, inherent in the typical personal property escheat statute, of determining the amount of stamp obligations subject to escheat. For, although the company may retain the power to alter the redemption value of stamps in terms of merchandise, its cash value would be fixed immediately upon distribution to the consumer. See note 86 *supra*. See also, note 103 *infra*.

⁹⁰ See note 74 *supra*.

⁹¹ As an example of the typical accounting provision, Ky. H. B. No. 4, 4th Sess., April 9, 1956, provided that: "Each issuer and each agent for redemption of trading stamps shall . . . maintain records of: (a) The value of trading stamps . . . distributed by such person within the state. (b) The date of issue. (c) The value of trading stamps redeemed . . . within two years after their date of issue, so that records will disclose accurately the total value of trading stamps so . . . distributed within this state which are not presented for redemption within two years after their date of issue."

⁹² Moreover, the requirement that the date and state of issue appear on the stamp precludes the objection on the part of stamp companies that they may be required to submit to a "double" redemption, since once a particular stamp obligation has been escheated, the company's obligation to the consumer ceases.

⁹³ In the proposed bills, the period available for redemption typically ranges from one to five years. See, e.g., N.Y. Assembly Bill No. 3977, Feb. 21, 1956 (authorizing the state to take custody of stamps unredeemed for five years); Ky. H. B. No. 4, 4th

legislation is the existence of abandoned or unclaimed property,⁹⁴ a conclusive presumption that all stamps issued and not redeemed one or two years prior to a particular escheat proceeding are abandoned might be deemed an unconstitutional deprivation of the stamp-saver's property.⁹⁵ Yet, the proposed legislative requirements that notice of this limited period be given to the consumer⁹⁶ and that redemption be made available in nominal amounts⁹⁷ would seem substantially to mitigate this contention.⁹⁸

Even assuming that the proposed legislation fully satisfies constitutional requirements necessary to escheat the obligations represented by unredeemed stamps, the stamp companies may still allege that its application would so diminish their profits as to prohibit their operations and thus exceed the legitimate scope of the police power. An argument by the companies that they would be so injured solely by the loss of non-redemption forfeitures would be unlikely, however, for this would tacitly admit that stamp companies could not survive but for gains not deservedly theirs. Rather, the companies would assert that profitable op-

Sess., April 9, 1956 (2 year escheat); Colorado "Escheat Bill," 1955 Sess. (unpublished), on file at Duke Law Library (one year escheat).

⁹⁴ See note 76 *supra*.

⁹⁵ Arguably, whether a given statutory period of redemption would be unreasonable should depend upon the length of time necessary for the average stamp-giving consumer, in the process of normal purchasing, to amass a number of stamps sufficient to acquire any of the items offered by the stamp company for redemption. However, the cash-option provision would seem effectively to rebut this argument.

⁹⁶ Notice to the consumer of the period during which stamps may be presented to the stamp company for redemption would generally be required by the proposed bills to appear both at the place where the stamp is distributed to the customer and in the customer's stamp saving book. See, e.g., the Kentucky proposal, note 74 *supra*. Furthermore, such notice would seem to be even more satisfactory than that provided by personal service upon the debtor and service by publication to the creditor which⁵ was held sufficient to alleviate due process objections in *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 434-35 (1951). See also, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950); *Security Savings Bank v. California*, 263 U.S. 282, 288 (1923).

⁹⁷ See note 74 *supra*.

⁹⁸ A final constitutional objection to the escheat of stamp company obligations which was raised in the New Jersey case is that, since such obligations are allegedly embodied in the stamps themselves, only those having a situs within the state seeking to escheat would be subject to that state's jurisdiction. And, thus, since it is impossible to determine the location of outstanding stamps, the state would be without jurisdiction to escheat. Although it is well settled that as to tangibles there can be but one situs and therefore one state with jurisdiction to escheat, the situs of intangibles is considered to be a "fiction" and thus imposes no limitation to a state's escheat power. Instead, the power to escheat intangibles "exists through the state's jurisdiction of the parties whose dealings have created the chose in action. . . ." *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 440 (1951).

erations would be impossible because of the burden imposed by the machinery necessary to escheat.

Unquestionably, the provision most crucial to the validity of escheat legislation and most onerous to the stamp companies is the one requiring that the date and state of issue appear on each stamp⁹⁹ and imposing on the company the responsibility of checking the date of stamps presented for redemption.¹⁰⁰ In determining whether this provision would unreasonably hamper a stamp company's activities, a court would balance the demonstrated extra expense to the company against the strength of the policy of escheat. While the effect of this expense would be accorded substantial consideration, it nevertheless seems unlikely that it would be held to outweigh the countervailing economic justification for escheat.

Even if a court were to decide that, cumulatively, the escheat provisions impose a prohibitory burden or that the statute is not a valid exercise of the state's escheat power, an important question would remain as to whether the entire scheme of the escheat provisions ought to be stricken or whether certain ones should be nullified and others retained. Irrespective of the basis of decision, it would appear appropriate to remove only those provisions most injurious to the companies and allow the remainder to retain effectiveness, provided, of course, that a valid legislative object, independent of escheat, could be found. Thus, the requirement that the date and state of issue be printed upon each stamp and that the company ascertain the date of issue of all redeemed stamps could clearly be held invalid, while the provision requiring that all stamps state a "cash" value and that redemption be made available in nominal amounts in cash or merchandise at the option of the holder might be upheld.

As to the cash option provision, there is clearly a valid legislative object, independent of escheat. This provision would not only reduce

⁹⁹ Without this provision, stamp companies might be required to submit to a "double redemption." See note 92 *supra*.

¹⁰⁰ A checking of the stamps by the companies upon redemption for date of issue would be necessary to prevent a double escheat, that is, the redemption of an obligation already escheated. The weight of this burden would depend upon the method of checking devised by the company. Of course, a company could simply fail to check and write off double redemptions as a type of bad debt. Companies might argue, as well, that because of an escheat statute in one state, a burden is imposed upon it to bear the expense of checking elsewhere to prevent a second redemption. However, it is just as likely that stamps issued elsewhere might be redeemed in the state seeking to escheat, thus reducing the amount inuring to the latter upon escheat. Since, on the whole, the company suffers no loss, the argument that checking elsewhere is necessary to prevent a loss would seem to be insubstantial.

the incidence of nonredemption,¹⁰¹ but would also tend to eliminate the injury to consumers resulting from stamp-company control of the stamp "price" and quality of its redemption premiums.¹⁰² Although the company would still have this control,¹⁰³ it could not afford to "price" its premiums above the prevailing market rates or the consumer would be inclined to demand redemption in cash and purchase the premium product elsewhere.

While escheat and related provisions would inure to the advantage of consumers and the public, they would be of little direct value to the injured retailers for whom little short of absolute prohibition of the stamp industry's activities will be sufficiently helpful. Of course, to the extent that regulatory legislation would harass and curtail stamp-company operations, it would alleviate some degree of retailer injury, an end clearly contemplated by those advocating such legislation.

V

FAIR TRADE LAWS AND TRADING STAMPS

Retailers, in their attack on trading stamps, have also sought to place the stamp-giving retailer at a competitive price disadvantage by invoking the fair trade laws.¹⁰⁴ The argument here advanced is that the

¹⁰¹ The fact that the consumer would no longer be required to save several books of stamps in order to secure the redemption premium, as is typically the case under present practices, added to whatever psychological effect there may be in the fact that the stamps themselves would be tantamount to cash, would undoubtedly effect some reduction in the rate of nonredemption.

¹⁰² Such injury to consumers would be most likely to occur in an area where stamps are well established and the stamp saving habit is inculcated in the consumer since a decrease in premium values would, in all probability, not be prevented by a proportionate decrease in consumer demand.

¹⁰³ The apparent retention by the company of the power to assign a cash value to stamps is a serious defect of the proposed escheat bills, for a company could place a very small cash value on the stamps and a much higher value on redemption merchandise. Such a tactic would largely frustrate the policy of escheat for the amount owing to the state for unredeemed stamps is based on their stated cash value. Probably the most satisfactory method of eliminating this infirmity would be to provide that the cash value of a stamp could be no less than the price at which the company issued it to the retailer.

¹⁰⁴ As to the application of fair trade laws to trading stamps, see generally, Comment, *Trading Stamps: Challenge to Regulation of Price Competition*, 105 U. PA. L. REV. 242 (1956); Notes, 63 HARV. L. REV. 366 (1949); 26 N.Y.U.L.Q. REV. 376 (1951); 25 TUL. L. REV. 525 (1951); 66 YALE L. J. 436 (1957); 22 A.L.R.2d 1212 (1952). Attempts have also been made to apply "sales-below-cost" acts and other price regulatory statutes such as cigarette and gasoline sales acts to the retail distribution of trading stamps, but with little success. See 105 U. PA. L. REV. 242, 254-60 (1956). There appears to be little concerted action by retailers to use these statutes for the purpose of regulating trading-stamp operations. Rather, trading stamps ordinarily become involved in fair-trade litigation when a manufacturer or a retailer initiates proceedings against

giving of trading stamps with a fair-traded item at its fair trade price is a prohibited form of price cutting or concession. Generally, however, except where fair trade statutes specifically refer to stamps¹⁰⁵ or coupons,¹⁰⁶ this statutory weapon has been rendered ineffective by judicial interpretation that the distribution of trading stamps is not violative of the fair trade laws.¹⁰⁷ However, these decisions are less important than the inherent inadequacy of these laws as protective devices for non-stamp-giving retailers.

If fair trade laws were uniformly applicable to the distribution of trading stamps with fair-traded items, the stamp-giving retailer would have two alternatives other than abandonment of his stamp plan. He

another retailer who distributes stamps with goods sold at the minimum fair trade price, or as in some recent litigation, when a manufacturer brings suit for injunctive relief against a violating retailer who defends by charging that the manufacturer has "unclean hands" in that it allows other retailers to sell its products at the minimum price and to distribute trading stamps as well. See *Colgate-Palmolive Co. v. Max Dichter & Sons, Inc.*, 142 F. Supp. 545 (D. Mass. 1956); 66 YALE L. J. 436 (1957).

¹⁰⁵ The Wisconsin statute specifically mentions stamps. WIS. STAT. § 100.15(2) (1953).

¹⁰⁶ *Lambert Pharmaceutical Co. v. Roberts Bros.*, 1950 Trade Cas. 62669 (Ore. Cir. Ct.); cf. *Bristol-Myers Co. v. Picker*, 302 N.Y. 61, 96 N.E.2d 177 (1950) (cash-register tape redemption plan held within the New York statute although this provision specifies "coupons.") See Notes, 63 HARV. L. REV. 366 (1949); 26 N.Y.U.L.Q. REV. 376 (1951); 25 TUL. L. REV. 525 (1951).

¹⁰⁷ The usual rationale is that stamps represent a "cash discount" rather than a price reduction. *Gever v. American Stores Co.*, —Pa. —, 127 A.2d 694 (1956). It has been suggested, however, that "labeling the stamps a 'cash discount' settles nothing, for . . . such treatment represents nothing more than seller's bookkeeping procedure." 105 U. PA. L. REV. 242, 249 (1956). Other theories marshalled in support of the majority holding that stamps are not within the statute are that stamps are a promotional device similar to advertising and that fair trade laws were not intended to cover trading stamps as they were enacted to prevent "loss leader" selling, a practice not involved in the trading-stamp operation. Cf. Note, 63 HARV. L. REV. 366 (1949). See Note, 66 YALE L. J. 436, 441-42 (1957); Also, it has been reasoned that even if there were a violation, it would not be enjoined since it is *de minimus non curat lex*. *Bristol-Myers Co. v. Lit. Bros. Inc.*, 336 Pa. 81, 6 A.2d 843 (1939). The validity of these last two conclusions might well depend upon which interests the statutes were designed to protect, the retailer's interest in price maintenance, or the manufacturer's interest in protecting the good will of his product. If the later view is adopted, even the *de minimus* argument appears to be sound; however, if the former is deemed to control, then the distribution of stamps might well be within the purview of the statute. While the controlling theory is that the purpose of fair trade laws is to protect the reputation of the manufacturer's product, this rationale should be recognized as having been adopted *ex necessitate* to uphold these statutes as against constitutional challenge. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936). Moreover, it appears that the acts were sponsored mainly by retailers and were probably intended primarily for their benefit. GREYER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION 99 (1939). However, whatever the theoretical conflict, because of the waning judicial tolerance of fair trade and the public policy against its extension, [*United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956)] a strict construction of fair trade legislation, which excludes trading stamps from its scope, would seem entirely justifiable.

might either raise the price of fair-traded items above the minimum in an amount equal to the value of the stamp as fixed by the company, or he might decline to give stamps on fair-traded items when sold at the minimum price. If the price of these goods were raised, consumers might easily recognize the price increase, however slight, because competition keeps their price at a minimum elsewhere and because the manufacturer often advertises his fair-trade price. If consumers related the higher price to the giving of stamps, they would likely infer that stamps mean higher prices on all goods in the store and thus become disillusioned with the stamp saving unless they would be persuaded that higher prices would be charged on fair trade items only. On the other hand, a retailer's refusal to give trading stamps with fair trade goods would not necessarily motivate consumers to go elsewhere. Although this practice would cause some dissatisfaction on the part of stamp-saving consumers, it is unlikely that they would prefer to purchase these goods in a non-stamp-giving store or that any but a slight disaffection for stamps would result.¹⁰⁸ Therefore, even if the fair trade laws uniformly applied, they would be of little protection to non-stamp-giving merchants. Because the majority of such statutes do not apply, however, and because of the declining popularity of fair trade laws, a fortiori, the same conclusion must be reached.

VI

FEDERAL REGULATION

While the possibilities of state regulation of the stamp industry have been discussed, because the industry's development presages important cumulative consequences for the national economy, some discussion of the bases and policy of possible federal regulation would appear also to be appropriate.

Federal regulation might emanate from the Federal Trade Commission in their administration of existing statutes or from additional congressional legislation. While the prospect of congressional action is presently highly doubtful,¹⁰⁹ regulatory efforts by the Federal Trade

¹⁰⁸ However, in at least one area of retail trade, *i.e.*, drug stores, neither raising prices nor refusing to give stamps on fair traded items would be satisfactory alternatives. If the latter method were employed, since a high proportion of the items merchandised in such a store are fair traded, the segregation of purchases and the frequent refusal to give stamps might well effect an appreciable customer dissatisfaction with stamp saving.

¹⁰⁹ The Senate Select Committee on Small Business has announced its intention to investigate the trading-stamp problem to determine whether "small business is being hurt" by stamps. *Wall Street Journal*, April 23, 1956, p. 1.

Commission appear more imminent in the light of the Commission's recently concluded investigation of selected industry members.¹¹⁰

At the outset, it must be observed that the Commission is presented with two fundamentally different approaches to regulation of the industry. The Commission may either determine that the trading stamp is illegal per se as an unfair competitive instrument and prohibit its use in commerce, or it may treat the stamp industry as legitimate and attempt to regulate certain practices of its members.

Quite conceivably, the Commission could conclude that trading stamp operations constitute "unfair methods of competition in commerce" and prohibit them under section 5 of the Federal Trade Commission Act.¹¹¹ In determining the legitimacy of these operations under this section, the same economic considerations that would be weighed by state legislatures would presumably influence the Commission. However, the Commission, is subject to certain limitations not encountered by legislatures¹¹² since it operates under a statutory directive to eliminate "unfair methods of competition," which both linguistically and traditionally is narrower in scope than the power of a state legislature to enact measures for the "general welfare."¹¹³ While at one time this term in section 5 of the Act

¹¹⁰ It has recently been reported that the Federal Trade Commission has decided not to proceed against the trading stamp industry as illegitimate per se. However, several complaints have been filed with the Commission purportedly charging some members of the industry with certain deceptive practices in advertising, price discriminations violative of the Robinson-Patman Act, and exclusive dealing contracts with retailers allegedly in violation of § 3 of the Clayton Act. As one agency official commented, "we will not ban the race track, but only make it operate legally." *Wall Street Journal*, Apr. 3, 1957, p. 1.

¹¹¹ 38 STAT. 719 (1914), 15 U.S.C. § 45 (1952) provides that: "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." See generally, BLAISDELL, *THE FEDERAL TRADE COMMISSION* (1932); HENDERSON, *THE FEDERAL TRADE COMMISSION* (1924); MCFARLAND, *JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION* (1933); Ely, *The Work of the Federal Trade Commission*, 7 WIS. L. REV. 195 (1932); Handler, *Unfair Competition*, 21 IOWA L. REV. 175 (1936); Handler, *Unfair Competition*, 8 GEO. WASH. L. REV. 399 (1940); Montague, *Unfair Methods of Competition*, 25 YALE L. J. 20 (1915); Watkins, *An Appraisal of the Work of the Federal Trade Commission*, 32 COLUM. L. REV. 272 (1932); Watkins, *Economic Implications of Unfair Competition*, 21 IOWA L. REV. 263 (1936).

¹¹² For other distinctions between a state legislature and the Federal Trade Commission related to the lesser power of the Commission see, MCFARLAND, *op. cit. supra* note 111, at 21.

¹¹³ The common law business tort of "unfair competition," though developed from diverse sources, has as its nucleus trade mark and trade name appropriation which became fused into an actionable wrong around the turn of the century. Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1296 (1940). Attempts to analyze this tort resulted in the formulation of the following elements: injury by way of loss of prospective trade, causation between defendant's conduct and plaintiff's harm, and the lack of a

was deemed to encompass only practices actionable at common law prior to the passage of the Act in 1914, for more than two decades the Commission's power has been held to extend to the prohibition of activities found to be "unfair" as against "public policy."¹¹⁴ Despite this theoretical amplitude of judicially approved power, the Commission has moved with caution in this area.

The requirement of a judicial finding that a practice sought to be

social and economic justification for the defendant's conduct. Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894). Such an analysis is of little value because it provides no guide for the solution to the most important question: which uses are socially and economically unjustified? Haines, *Efforts to Define Unfair Competition*, 29 YALE L. J. 1 (1919). Due to this difficulty, common law precedents tend to be restricted to clear violations of basic business morality. See generally NIMS, LAW OF UNFAIR COMPETITION AND TRADEMARKS (4th ed. 1947); PROSSER, TORTS 745 (2d ed. 1955); Callmann, *What Is Unfair Competition?*, 28 GEO. L.J. 585 (1940); Handler, *Unfair Competition*, 21 IOWA L. REV. 175 (1936); Rodgers, *Unfair Competition*, 17 MICH. L. REV. 490 (1919).

¹¹⁴ When Congress passed § 5 of the Federal Trade Commission Act, the meaning it collectively ascribed to this term was a source of great controversy. One writer discerned eight separate meanings used in the committee reports and debates. Montague, *Unfair Methods of Competition*, 25 YALE L. J. 20, 29 (1915). However, it has been pointed out numerous times that Congress adopted the phrase "unfair methods of competition" as a broader and more flexible term than its common law counterpart, "unfair competition." Handler, *Unfair Competition*, 8 GEO. WASH. L. REV. 399 (1940). Despite a then widespread conclusion that Congress had adopted a general declaration condemning unfair practices and leaving to the Commission the determination of which practices were unfair, [MCFARLAND, *op. cit. supra* note 111, at 42] the first important decision from the Supreme Court deemed that "it was for the courts, and not the Commission, ultimately to determine" what the phrase means. It is "clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression. . . ." *FTC v. Gratz*, 253 U.S. 421 (1920). This decision was regarded by the Commission as limiting applicability of the term to conduct actionable at common law. F.T.C. Ann. Rep. 7 (1923). *FTC v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934), however, is the foundation of the more liberal interpretation of the Commission's powers, in part because of the enunciation of the doctrine that "unfair methods of competition" includes acts which are in contravention of "public policy." Because traces of this doctrine can be found in earlier cases, [*FTC v. Beechnut Packing Co.* 257 U.S. 441 (1922)], the most important aspect of the *Keppel* decision is its shift of emphasis from precedent to a broader standard and its implication of greater administrative freedom in expansion of the unfair practices concept. According to one writer, "the revolutionary change of attitude of the court . . . virtually consigned the definition in the *Gratz* case to oblivion." Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 241, 243 (1936). While this decision freed the Commission from the restraining precedents of common law, the problem of determining the content of the "public policy" doctrine still remains. The logical conclusion to be drawn is that while applicable case decisions and statutes are not necessary to a finding of unfair competition, because of the necessity of judicial control, it is required that there be some authoritative indication of a public policy against the allegedly "unfair" practice. Whether such an indication would have to consist of statutes, decisions, or even emanate from an organ of government is uncertain, but likely. Scholarly opinions of economists in a complex field, or even the findings of the Commission itself made after extensive investigation of the practice probably would be insufficient. See note 121 *infra*.

prohibited is violative of established "public policy" is not a formal one, but is rather a doctrine devised to operate as a check on the substantive power of the Commission.¹¹⁵ The context of this term is traditionally supplied by reference to statutes and case decisions and accepted concepts of business morality. Thus, in the decisions prohibiting the use of punchboards in the sale of merchandise, the closest precedents analogous to trading stamps,¹¹⁶ numerous state statutes declaring certain types of lotteries illegal and ethical restrictions against gambling were relied upon.¹¹⁷

It is difficult, however, to discover an established "public policy" with respect to trading stamps. There are only a few state statutes of importance concerning stamps and they do not prohibit the issuance of stamps but merely impose a tax on stamp-company operations.¹¹⁸ More-

¹¹⁵ Although it may be argued that the "public policy" doctrine is a standard required by constitutional law to keep the Commission within ascertainable administrative bounds, it would seem that the statutory phrase "unfair methods of competition" is in itself a sufficient standard to satisfy constitutional requirements. Instead, the doctrine appears to be a compromise between a judicial *carte blanche* to the Commission and a retention of the earlier practice of obvious substitution by the court of what it considered "unfair" for the Commission's findings of unfairness as a fact.

¹¹⁶ The Supreme Court in *FTC v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934) concluded that merchandizing of candy by use of punchboards was a proper subject of interdiction by the Commission under the rubric of "unfair methods of competition." See Note, *The Prohibition of Gambling Devices by the Federal Trade Commission*, 47 COLUM. L. R. 647 (1947); 42 ILL. L. REV. 384 (1947).

Traditional definitions of a lottery under state statutes and decisions require as elements: consideration, chance and prize. Pickett, *Contests and the Lottery Laws*, 45 HARV. L. REV. 1196 (1932). Such a definition would appear inapplicable to trading stamps because the right to the premium is relatively fixed and absolute upon receipt of the stamps, and does not rest upon an element of "chance." However, the element of chance may enter in determining the amount of consideration which is paid for the stamps, *i.e.*, in terms of higher prices. The mere fact that merchandise is given to all who pay consideration has been held insufficient to save merchandising devices when the right to the extra prize depended upon chance. *FTC v. F. A. Martoccio Co.*, 87 F.2d 561 (8th Cir. 1937), *cert. denied*, 301 U.S. 691 (1937). Since prize and consideration have thus been assimilated, one being a part of the other, it would appear logically possible to find a lottery when the amount of consideration paid for stamps was based upon chance. However, whether this amount paid would be "consideration," or whether it is based upon "chance" or shopping skill are related questions. While admittedly, this may not be a sufficient rationale for the application of state lottery statutes, stamps might still be condemned as being in the nature of a lottery.

¹¹⁷ "Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like fail to reach this particular practice [the "break and take" device used in sale of penny candy], it is clear that this practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy." Stone, J., in *FTC v. R. F. Keppel Bro., Inc.*, 291 U.S. 304 (1934).

¹¹⁸ Statutes of Kansas, Washington, and Tennessee impose high taxes on the operation. See notes 9, 26, 71, *supra*. Nevertheless, it is clear that the legislative intent was to prohibit the activities of the stamp companies and, as such, these enactments would qualify as expressions of public policy.

over, there is a multitude of state cases declaring stamp prohibition statutes invalid,¹¹⁹ and perhaps a negative inference may be drawn from the fact that state legislatures in numerous states have recently failed to enact new prohibitory statutes.¹²⁰ Thus, while such recognized gauges as statutes and court decisions do not, on the whole, support a conclusion that trading stamps are violative of an *established* public policy, arguably they, alone, are inadequate indices of the public interest. For, when the subject under investigation is as complex as the trading stamp operation, a penetrating economic study and analysis is a condition precedent to the ascertainment of the public interest. Were an economic test alone to be adopted, however, courts would, to a great extent, be bound by the Commission's findings based upon economic study and argument, and the doctrine would no longer operate as a control over the Commission's power.¹²¹ But in the "gradual process of inclusion and exclusion"¹²² of the Commission's section 5 power, it is but a short, though

¹¹⁹ See note 31 *supra*. While admittedly a majority of state court opinions dealing with anti-stamp legislation have held such statutes unconstitutional, the fact that legislatures in more than twenty states saw fit to adopt such legislation deserves some weight in the ascertainment of whether a sufficient public policy against stamps exists. In accordance with present concepts of deference to the legislative function of policy formulation in economic affairs, these statutes might be deemed to have greater weight than the expressions of the local judiciaries which disapproved of them, especially since the Supreme Court in the *Rast* case arrived at a conclusion incompatible with these state court decisions. However, the mere age of these expressions of legislative intent and judicial sentiment may render both less significant as bases for ascertainment of a present public policy.

¹²⁰ See note 67 *supra*. In 1955, only two of twenty-six legislatures to which bills adversely affecting stamps were proposed adopted such legislation. However, efforts by retail groups to obtain legislation have been instituted on a vigorous scale in the 1957 legislative sessions. Already Tennessee has adopted a severe tax statute. See note 71 *supra*.

¹²¹ While it is not presently to be expected that the federal courts would approve an economic test per se, respectable arguments could be marshalled in behalf of such adoption. In other realms of the Commission's jurisdiction, as for example the "basing point" cases under the Robinson-Patman Act, the courts have relied heavily upon the economic findings of the Commission even though economists were in disagreement on the subject. See, e.g., *FTC v. Cement Institute*, 333 U.S. 683, 726-27 (1948). It was not there necessary to show that the state legislatures disapproved of the practice, for it was too complex, and it is hardly clear that the basing point system, even though controversial, was contrary to basic business morals. Moreover, it is beyond dispute that economic analysis carries considerable weight in Commission-prosecuted cases under the Sherman Act and yet the statutory formulas there are no less vague than under the Federal Trade Commission Act. Therefore, judicial shift in emphasis from standards of precedent and morals to economic analysis in unfair-practice cases would neither be unusual nor unjustified in the light of the Commission's extensive knowledge and general experience.

¹²² Undoubtedly, "Unfair Methods of Competition" has a broader meaning than that given to "unfair competition" at common law. But, "[i]t belongs to that class of phrases which do not admit of precise definition . . . the meaning and application of which must be derived by the gradual process of judicial inclusion and exclusion." Sutherland, J., *FTC v. Raladam Co.*, 283 U.S. 643, 648 (1931).

important, judicial step to accord less significance to the statutory and decisional background and to view contemporary economic analysis as more persuasive. Under such a combination test, the basis of some decisions upholding prohibitory legislation, plus a finding of a tendency toward public deception in values, added to a clear showing of substantial injury to non-stamp-giving retailers might be deemed indicative of a "public policy" justifying the prohibition of trading stamps.¹²³

If the Commission does not attempt to prohibit the use of trading stamps, it may still elect to regulate certain practices of the stamp companies and, for this purpose, treat their basic operations as legitimate. The two most obvious regulatory methods which the Commission could adopt are the prohibition of stamp company advertising of "free" premiums as a deceptive practice under section 5 of the Federal Trade Commission Act and the elimination of certain price discriminations through application of the Robinson-Patman Act.

Generally, it has been held that the advertised offering of an article as "free" is a deceptive practice within section 5 of the Federal Trade Commission Act¹²⁴ when the person to whom the offer is made must, to obtain the article, render an extra performance of a substantial nature,

¹²³ Assuming that trading stamps could be found an unfair competitive instrument, there is a conceptual hurdle in enforcing "cease and desist" orders against the stamp company in that the stamp-giving retailer rather than the company is the "unfair competitor." In the *Lottery Cases*, after efforts to enforce orders against manufacturers of goods who sold them packaged with gaming devices to retailers had failed, the Commission successfully proceeded against the source of the evil, the manufacturers of the devices. See Note, 47 COLUM. L. REV. 647 (1947). Interesting questions, however, exist as to enforcement against organizations using stamps other than stamp companies; for example, large grocery chains which give stamps only at their own stores, cooperatives formed by local groups which give and redeem their stamps on a non-profit basis as a defense against outside stamp companies, or even the independent merchants who redeem their cash register receipts. See note 14 *supra*. Irrespective of the economic propriety of allowing such stamp operations to continue after prohibition of activities of large stamp companies; it must be noted that the Commission's power is circumscribed to prohibition of unfair methods of competition "in commerce." In *FTC v. Bunte Bros., Inc.*, 312 U.S. 349 (1941) the Supreme Court, in a six-three decision, construed words "in commerce" to be a lesser Congressional grant of power than "acts affecting commerce," and refused to uphold the Commission's orders because the respondent distributed its punchboards only in the state of manufacture. It would appear, then, that the merchant who redeems his cash register receipts is clearly exempt as well as the local, or even state-wide, cooperative, but the national chain store might still remain subject to the Commission's jurisdiction despite the local nature of its distribution and redemption of stamps because the stamps are tied to the chain's merchandise and this is sold across state lines. It is unlikely, however, that the *Bunte Bros.* decision would permit a stamp company, prohibited from interstate distribution, to continue operations on a national scale through locally incorporated subsidiaries.

¹²⁴ Under the Wheeler-Lea amendment to § 5 of the Federal Trade Commission Act, the Commission is empowered to prohibit "deceptive acts and practices in commerce." 52 STAT. 111 (1938), 15 U.S.C. § 45 (1952).

such as the purchase of other articles. It would appear that stamp company offers clearly fall within this extra performance test since the stamps with which the "free" premiums are secured can only be obtained through the purchase of goods. The basis for the "extra performance" rule is that the credulous might be misled into believing that the article offered as "free" is a gratuity, not realizing that its cost might have been added to the price charged for the article sold.¹²⁵ This rationale would seemingly apply with special vigor to the stamp operation for it appears that, generally, the consumer pays at least a portion of the cost of stamps in the form of higher prices, and yet a large number of stamp-saving consumers apparently believe otherwise.¹²⁶ Moreover, in the typical "free" goods offer, it is at least possible for the offeror to absorb completely the cost of the article offered as "free."¹²⁷ The stamp com-

¹²⁵ *FTC v. Standard Education Society*, 302 U.S. 112 (1937) (encyclopedias offered "free" upon purchase of supplements); *Book-of-the-Month Club v. FTC*, 202 F.2d 486 (2d Cir. 1953) (book offered "free" upon a promise to purchase four others). The rendering of services as a condition to obtaining the "free" article has also been held violative of § 5. *Rosenblum v. FTC*, 192 F.2d 392 (2d Cir. 1951), *cert. denied*, 343 U.S. 905 (1952) ("free" dresses offered to prospective saleswomen, to be given in proportion to the amount of dresses sold); *Progress Tailoring Co. v. FTC*, 153 F.2d 103 (7th Cir. 1946) ("free" suits offered to prospective salesmen).

Actually, the Commission has altered its policy concerning "free" goods offers containing undertakings to purchase other goods. After the *Standard Education* case, *supra*, the Commission limited its significance by holding that when an advertisement "clearly and conspicuously" stated the extra requirements to obtain the "free" goods offered, such advertisement was not a violation of the Act. *Samuel Stores, Inc.*, 27 F.T.C. 882 (1938). Subsequently, the Commission by interpretive ruling took a broader view requiring the article offered as "free" to be a "gift or gratuity" not subject to extra conditions such as the "purchase of other merchandise." 16 C.F.R. § 4.1 (1949). The *Samuel Stores* decision, *supra*, was then expressly overruled in the *Book-of-the-Month-Club* case, *supra*. See Note, 48 NW. U. L. REV. 505 (1953). The Commission then reversed itself again in *Walter J. Black, Inc.*, F.T.C. Dkt. 5571 (1953), a decision which appears to be a reversion to the *Samuel Stores* doctrine. See Note, 52 MICH. L. REV. 1249 (1954). While the Commission has vacillated in its solution of the problem, if it determined that offers of "free" premiums constitute deceptive practices, its decision would probably be upheld under the precedent of the *Standard Education* case, *supra*.

An advertisement need only have a tendency or capacity to deceive to be violative of the Act. *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934). Actual deception is not required. *FTC v. Raladam Co.*, 316 U.S. 149, 152 (1942). The "general populace" which might be deceived by such an offer necessarily includes the ignorant, unthinking and credulous. *FTC v. Standard Education Society*, 302 U.S. 112, 116-17 (1937). While it may be obvious that an extra condition is required, it is often difficult to determine whether the price for the attached article has been raised, this apparently being the deception against which the extra performance rule is directed.

¹²⁶ See note 44 *supra*.

¹²⁷ The fact that there is no price increase in the attached article which must be purchased does not appear to be a defense. *Book-of-the-Month Club v. FTC*, 202 F.2d 486 (2d Cir. 1953) (the sales price of the books required to be purchased was less than the average retail price). Since some portion of the cost of trading stamps is borne by the purchaser, a fortiori, stamp company offers should also be prohibited.

panies, however, are powerless in this respect, and, in fact, are ignorant of the extent to which retailers pass on the cost of stamps to consumers.

The second possible regulatory effort by the Commission is one of several applications of the Robinson-Patman Act, which declares it illegal for "any person . . . to discriminate in price between purchasers of commodities of like grade and quality. . . ."¹²⁸

The most important application of the Act¹²⁹ would be against individual stamp companies for discrimination in price among stamp-giving retailers.¹³⁰ This discrimination may take one or a combination of three forms: as between areas, a lower price being offered in underdeveloped stamp territories;¹³¹ as between retailers in different types of trades;¹³² and as between retailers on the basis of the quantity of stamps distributed,

¹²⁸ 38 STAT. 370 (1914), 15 U.S.C. § 13(a) (1952). See generally, AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT (1950); WERNE, BUSINESS AND THE ROBINSON-PATMAN LAW: A SYMPOSIUM (1938); ZORN & FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS (1937); *Price Discrimination and Price Cutting*, 4 LAW & CONTEMP. PROB. 271 (1937); COMMERCE CLEARING HOUSE, SYMPOSIA ON THE ROBINSON-PATMAN ACT (1946, 1947 and 1948).

¹²⁹ There are two other possible applications of this Act affecting trading-stamp companies. First, the Commission may proceed against manufacturers of premium merchandise for granting discriminatory quantity discounts as between stamp companies. If successfully applied, it would tend to place smaller stamp companies with less buying power more on a parity with the larger companies, thus stimulating competition within the industry. Although discrimination in price by a seller between buyers is presumptively illegal, the Act provides the seller with an affirmative defense if the discrimination is justified by cost savings to him; quantity discounts are governed by this rule. *Morton Salt Co. v. FTC*, 334 U.S. 37 (1948). See Haslett, *The Validity of Quantity Discounts*, C.C.H. ROBINSON-PATMAN ACT SYMPOSIUM 26 (1948).

The second application of this Act might be against individual stamp companies, requiring them to maintain nation-wide uniformity in "pricing" premium merchandise in terms of stamps. Thus, a company would be prevented from imposing a higher "price" in one area in order to offset losses incurred in another where its competitive position is less secure.

¹³⁰ It is apparently the practice of many of the larger stamp companies to distribute their stamps to retailers at varying prices. INTERVIEW. See also, *Business Week*, May 19, 1956, p. 3.

¹³¹ Though such a practice has a justifiable object, the price reduction would have to be of a temporary nature to fall within a possible implied exception of "introductory offer" to the Robinson-Patman Act.

¹³² The purpose to be served by such discrimination is uncertain, though it is possible that a reason might exist for offering a lower price to retailers engaged in trades involving low profit margins and strong price competition, where it would be difficult for the retailer to raise prices to cover the cost of stamps, e.g., gasoline retailers. See Comment, *Trading Stamps*, 24 TENN. L. REV. 557, 564 (1956). It is possible, though unlikely, that this discrimination could be justified as a reasonable classification of customers, but the "separate channel" theory justifying such classification appears to be based upon circumstances inherent in traditional merchandise distribution, and not present in stamp transactions. See Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 YALE L. J. 929 (1951).

a lower price being offered to larger retailers.¹³³ Of these practices, the Commission would be most desirous of eliminating the discrimination based on the amount of stamps distributed, for this disadvantages small retailers *vis-à-vis* larger retailers in direct contravention of the purpose of the statute.

However, an attempted application of the Act to these practices would be well defended. First, it could be urged that the company-retailer transaction is not a sale to a "purchaser," but a lease or license authorizing the retailer to use the company's advertising services.¹³⁴ In the company's view, the retailer receives a package promotion which is not a "commodity" within the meaning of the Act, and the stamps, while "commodities," are intrinsically worthless bits of paper, absent a promise of redemption.¹³⁵ Considering, however, that the price paid by the retailer is measured by the quantity of stamps he receives, it is quite possible that the Commission would choose to treat the company's argument as merely placing a label of "license" on a contract of sale.¹³⁶ The second

¹³³ If the Act applied to this practice, it is highly unlikely that the companies could demonstrate a "cost justification" defense. See note 129 *supra*.

¹³⁴ The stamp companies in their literature are consistently careful to describe the transactions with the retailers who distribute the stamps as "license agreements," and these retailers as "licensees." See e.g., Sperry & Hutchinson Company contract, Form 22 M. Rev. Sept. 10, 1956, on file in Duke Law Library. The contract also carefully stipulates that title to the stamps remains at all times in the stamp company, another unilateral attempt to negate a possible implication that the stamps are "sold." *Ibid*.

¹³⁵ A somewhat similar argument was successful in the case of *General Shale Products Corp. v. Struck Construction Co.*, 132 F.2d 425 (6th Cir. 1942). There, a contract to construct a building was deemed not to be a "commodity" within the Act though the bid used to obtain the contract contained an allegedly discriminatory price for bricks, the court refusing to consider the agreement divisible into two contracts, one for work and labor and the other a sale of bricks.

¹³⁶ The interpretation of the word "commodity" presents a novel question. The companies' argument is hopefully rested upon two previous interpretations. In *Fleetway, Inc. v. Public Service Interstate Transp. Service Co.*, 72 F.2d 761 (3rd Cir. 1934), *cert. denied*, 293 U.S. 626 (1935), which involved competitive price cutting between two small bus companies and found to have been initiated by the plaintiff, the court, under the original Clayton Act, held that bus tickets were not "commodities" within the statute. See Note, 34 COLUM. L. REV. 1566 (1934). Also, the Federal Trade Commission once dismissed a complaint against publishers charged with quoting proportionally higher prices for less than a full page of advertising space than for a full page on the grounds that advertising space was not a "commodity" within the meaning of the Act and that no injury had resulted from the practice. 81 CONG. REC. 2336 (1937). Despite these previous interpretations, it seems clear that if a court were disposed to prohibit the discrimination, neither the language of the statute nor the extant interpretative authority would be a substantial impediment. An examination of the merits of the defense is, therefore, necessary. There may be justification for excluding transactions such as patent licenses, contracts for personal services, and agreements to furnish advertising space, but each of these is easily distinguishable from the wholesale distribution to tens of thousands of retailers of millions of identical, small-denominational choses in action under nationally

defense is that since the companies, because of exclusive franchise arrangements, do not sell to competing retailers, as between the latter, competition is not diminished. While this may be true, this discrimination may tend substantially to lessen competition between stamp companies,¹³⁷ and, since the Act forbids discrimination "in any line of commerce"¹³⁸ where its effect may lessen competition,¹³⁹ it would appear that this defense is also vitiated.

In sum, the Commission is faced with two alternatives—the absolute prohibition of the stamp industry or regulation of certain practices of some of its members. While prohibition is possible, it is unlikely that the Commission will initiate such action since the magnitude and the popular approval of the industry would militate against it. On the other hand, it seems likely that the Commission could succeed in eliminating the word "free" from stamp company advertising and possibly could prohibit certain price discrimination under the Robinson-Patman Act.

VII

CONCLUSION

Absent governmental intervention, it appears certain that trading stamps will continue to play an important role in retail merchandising. Although federal regulation is presently doubtful, continued attempts to restrict stamp-company operations at the state level seem inevitable. Here, outright prohibition, while conceivably constitutional under ex-

uniform contracts. Viewed as such, there is no more economic reason to exclude trading stamps from the statute than to exclude distribution of cans of soup, for certainly the public interest in the prevention of injury from price discrimination is proportionally as great in one as the other.

¹³⁷ It is questionable whether this price discrimination between retailers may tend substantially to lessen competition between stamp companies. The stamp companies would urge that, because they are each restricted by exclusive franchise agreements not to sell to competing retailers, competition between companies could not be lessened by this practice. However, these contracts are of short-term duration, and if a company were well developed in an area, the retailer could repeatedly be forced, at the end of each term, to accept a smaller franchise area, with the effect that such contract would be conditioned upon, rather than restrictive of, development of local monopoly power. Since the Commission need only demonstrate that this practice *may* tend substantially to lessen competition, and "may" has been interpreted as "possibly" rather than "probably," [Morton Salt Co. v. FTC, 334 U.S. 37 (1948)] it would seem that the above argument of the companies would not preclude this inference.

¹³⁸ 38 STAT. 370 (1914), 15 U.S.C. § 13(a) (1952).

¹³⁹ While the great bulk of Robinson-Patman cases concern price discrimination which is alleged to reduce competition between the seller's customers, a discrimination which injures competition between sellers is also prohibited. *Muller & Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944); *Puerto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234 (2d Cir. 1929).

panded concepts of the police power, seems unlikely to receive either legislative or judicial approval. Less stringent state action, however, particularly the escheat proposals drafted especially to embrace the stamp operation, may ultimately have a restrictive effect upon the stamp industry.